No. 03-1566

Supreme Court, U.S.
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In The Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CENTRAL ARIZONA WATER CONSERVATION DISTRICT, MARICOPA-STANFIELD IRRIGATION & DRAINAGE DISTRICT, CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICT AND ARIZONA DEPARTMENT OF WATER RESOURCES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Three of the *amici curiae* are defendants in lawsuits filed by a small group of farmers in two central Arizona irrigation districts claiming that they are intended beneficiaries of the districts' Central Arizona Project ("CAP") Agricultural subcontracts for Colorado River water. The lawsuits seek to prevent their irrigation districts from relinquishing high-priced long-term subcontract water for low-cost, medium-term water contracts. The relinquishment of the subcontract water is an essential element of the comprehensive and landmark settlement of CAP water allocations and repayment obligations and water rights claims of two major Arizona Indian communities ("Settlement"). The Settlement is embodied in and authorized by the recently enacted Arizona Water Settlements Act, P.L. 108-451 ("Settlements Act").

One of the lawsuits filed by the farmer group is a federal action against *amicus* Central Arizona Water Conservation District ("CAWCD"), now pending on appeal in the Ninth Circuit ("Federal Case"). The other is a state

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[1] Because the Central Arizona Water Conservation District, the Maricopa-Stanfield Irrigation & Drainage District and the Central Arizona Irrigation and Drainage District are political subdivisions and municipal corporations of the State of Arizona, they are not required to obtain consents of the parties to the filing of this brief, and are not required to make disclosures under U.S. Sup. Ct. R. 37.4, 37.6. Ariz. Rev. Stat. Ann. §§ 48-3702, 48-2901; Ariz. Const. art. 13, § 7. The Arizona Department of Water Resources is the agency of the state with responsibilities for surface water and interstate stream matters with its own legal staff. It should qualify as a "similar entity" under Rule 37.4. However, *amici* are filing with the Court the consents of all parties. This brief was not authored in whole or in part by counsel for any party; no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

court action against *amici* Maricopa-Stanfield Irrigation & Drainage District ("MSIDD") and Central Arizona Irrigation and Drainage District ("CAIDD") that is the subject of a petition for special action recently filed with the Arizona Supreme Court ("State Case"). *See Maricopa Stanfield Irrigation & District, et al., v. Robertson,* Arizona Supreme Ct. No. CV-04-0385-5A. App. 21.

The fourth *amicus* is the Arizona Department of Water Resources (the "Department"), the agency for the State of Arizona with general control and supervision of surface water, its appropriation and distribution. Ariz. Rev. Stat. Ann. § 45-103(B).

The purpose of this *amici* brief is to support the Respondents and advise the Court that the issues presented in the State Case and Federal Case arise from facts and law that differ, in important ways, from the facts and law in *Orff*. The *Orff* Petitioners' brief is predicated on their asserted ownership of appurtenant water rights under Section 8 of the 1902 Reclamation Act. Congress, in Section 5 of the 1928 Boulder Canyon Project Act, exempted post-1928 Colorado River water rights from the application of Section 8. *Amici,* in this brief, urge the Court to recognize the important differences between the issues presented by *Orff* and the issues currently under review in the Federal Case and State Case.

Central Arizona Water Conservation District

The Central Arizona Water Conservation District is a multi-county water conservation district and a political subdivision in Arizona that has contracted with the United States for the operation and repayment of the Central Arizona Project, a federal reclamation project. *See* Ariz. Rev.

Stat. Ann. §§ 48-3701 to -3738.[2] The CAP annually delivers to water users in central and southern Arizona 1.5 million acre feet of Arizona's entitlement to Colorado River water.[3]

CAWCD was the defendant in case No. CIV 03-0505 in the United States District Court for the District of Arizona, *John E. Smith, et al. v. Central Arizona Water Conservation District*. The plaintiffs in the Federal Case (hereinafter, "Smiths") were landowners in two Arizona irrigation districts – MSIDD and CAIDD (collectively, the "Irrigation Districts"). Each of the Irrigation Districts was a party to an Agricultural subcontract with CAWCD and the United States ("Subcontract") pursuant to which the District was to purchase and receive Colorado River water through the CAP. Smiths were not parties to the Subcontracts, but asserted in the litigation that they were third-party beneficiaries. On September 12, 2003, Judge Earl H. Carroll ruled that Smiths were not third-party beneficiaries and dismissed the case. App. 1. Smiths have appealed to the Ninth Circuit, matter No. 03-16962. The appeal has been fully briefed and is currently pending before that court.

Maricopa-Stanfield Irrigation & Drainage District and Central Arizona Irrigation and Drainage District

MSIDD and CAIDD are irrigation districts in Pinal County, Arizona and are parties to long-term Agricultural

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[2] CAWCD and the Secretary in 1972 entered into a Master Repayment Contract for the delivery of Colorado River water through the CAP and for the repayment of the allocable costs of the Project. This Contract was superseded and replaced by the 1988 Master Contract. *See* App. 94, and ¶ 9 Joint Statement of Facts, App. 88.

[3] For the purposes of this brief, the term "Colorado River water" means post-1928 Colorado River water released from Hoover Dam pursuant to the Boulder Canyon Project Act of 1928.

CAP Subcontracts with the United States and CAWCD.[4] App. 159. The Subcontracts provide for the delivery of Colorado River water to the Irrigation Districts and govern the terms of its purchase by each Irrigation District. The individual landowners within the Irrigation Districts were not parties to the Subcontracts.

The farmers in the Irrigation Districts have never been able to afford to buy CAP water at the price set by the Subcontracts. For that reason, neither District has ever received any CAP water pursuant to its Subcontract. Exhibit A to CAIDD Statement of Facts, Affidavit of Paul Orme, ¶ 9, App. 205. In 1993, when construction of the CAP was completed, the Irrigation Districts advised CAWCD that they could not afford to pay the price dictated by the Subcontracts. The Irrigation Districts and CAWCD dealt with the problem by entering into ten-year Excess Water Contracts in 1994 that allowed the Districts to purchase "excess" CAP water at affordable rates. *Id.* The Irrigation Districts did receive CAP water pursuant to the Excess Water Contracts. Those agreements expired at the end of 2003. *Ibid*; CAIDD Statement of Facts, ¶¶ 16-23, App. 197-200.

In 2002, CAWCD entered into the Arizona Water Settlement Agreement ("Settlement Agreement") with the Arizona Department of Water Resources and the United

[4] The Subcontracts with the Irrigation Districts were entered into pursuant to the Master Repayment Contract. Except for the names of each District and subarticle 4.13(a) stating the amount of the Subcontractor's water entitlement, the terms of the Subcontracts of the Irrigation Districts are identical. Joint Statement of Facts, ¶ 18, App. 89.

States through the Secretary of the Interior ("Secretary").[5] App. 60. The Settlement Agreement established the processes for implementing the Settlement embodied in the Settlements Act enacted by Congress on November 17, 2004 and signed by the President on December 10, 2004. CAWCD, in December 2002 pursuant to the Settlement Agreement, adopted a new policy for marketing excess water to irrigation districts. Under this policy, the districts were offered new contracts for the purchase of excess CAP water at low rates through 2030 in exchange for relinquishment of their CAP Agricultural Subcontract allocations. Districts could retain Subcontract water rights, but no district would be allowed to purchase excess CAP water at the low price until it had ordered and paid the full price for any Subcontract water it had retained. *See* Settlement Agreement, subparagraphs 6.3, 6.4, App. 70-71.

Pursuant to the Settlement Agreement, CAWCD offered a package of benefits to each Irrigation District in exchange for relinquishment of its subcontract rights *Id.* ¶¶ 7, 8, App. 72-75. Both of the Irrigation Districts held elections to determine whether landowners favored the District's relinquishment of subcontract water rights in return for the various benefits that were offered. A majority of the votes cast in each of the Irrigation Districts favored the proposed relinquishment. CAIDD Statement of Facts, Affidavit of Paul Orme, ¶¶ 18, 24, App. 207-208.

In 2001, Smiths with approximately thirty-nine other landowners, filed a civil action in the Pinal County Superior

[5] While the United States did not execute the Settlement Agreement in 2002, the Settlements Act authorizes and directs the Secretary to execute the Settlement Agreement. *See* § 2 (34), § 106(a)(2).

Court against the Irrigation Districts. *Smith et al. v. Maricopa-Stanfield Irrigation & Drainage District, et al.*, No. CV 2001-00924.[6] The action sought to prevent the Irrigation Districts from relinquishing any of the CAP Subcontract water in which Smiths claimed appurtenant ownership interests.[7] Over two hundred landowners joined the Irrigation Districts in defending against Smiths in the State Case.

In December, 2003, Smiths moved for partial summary judgment. The Irrigation Districts and defendant landowners filed cross-motions for summary judgment. On November 16, 2004, the trial court entered its minute entry ruling granting summary judgment to Smiths. App. 14. The state trial court held that rights to Colorado River water under the CAP subcontracts were appurtenant to Smiths' land and that rights under each of the Agricultural CAP Subcontracts were contractually vested in the landowners and enforceable by them. The trial court also held that the landowners were intended third-party beneficiaries of the CAP Subcontracts and that an Irrigation District could not modify its Subcontract in any way that would affect a landowner's purported appurtenant rights without that landowner's consent.

[6] Plaintiffs in the State Case will also be collectively referred to herein as "Smiths".

[7] Of the 293,795 acre-feet of Agricultural CAP water potentially available to the Secretary for the Settlement, up to 180,000 acre-feet were to be relinquished by the Irrigation Districts. Settlement Agreement, subpara. 4.1.5, Table 5.1.4, App. 64-66, 68. If the two Irrigation Districts are not able to relinquish this water, the Secretary will not receive the 197,500 acre-feet required to implement the Settlement. (293,795 minus 180,000 equals less than 197,500.)

On December 14, 2004, the Irrigation Districts and 200 landowners filed a Petition for Special Action with the Arizona Supreme Court, urging the Court to take special action jurisdiction because of the state-wide importance of the case and to reverse the lower court's ruling. App. 21[8] On pages 1 through 5 of the Petition, the elements of the Settlement and their importance to Arizona are described.

The Arizona Department of Water Resources

The Department is the agency for the State of Arizona with general control and supervision of surface water, its appropriation and distribution. Ariz. Rev. Stat. Ann. § 45-103(B). The Director of the Department is charged with the duty of prosecuting and defending "all rights, claims and privileges of this state [the State of Arizona] respecting interstate streams," which includes the Colorado River. Ariz. Rev. Stat. Ann. § 45-105(A)(9).

The Director is also authorized, on behalf of the State of Arizona, to consult, advise and cooperate with the Secretary of the United States Department of the Interior ("Secretary") in the exercise of the Secretary's authority under the Boulder Canyon Project Act as well as the Secretary's authority to contract for the delivery of water from the main stream of the Colorado River for use within

[8] Briefs *amicus curiae* have been filed with the Arizona Supreme Court in support of the Petition for Special Action by the Arizona Department of Water Resources, CAWCD, the Gila River Indian Community, the Cities of Scottsdale, Mesa, Chandler, Glendale, and Goodyear, the Hohokam Irrigation & Drainage District and San Carlos Irrigation & Drainage District, and the Salt River Project.

the State of Arizona. Ariz. Rev. Stat. Ann. § 45-107(A)(1) and (2).

The Department has a strong interest in the trial court's ruling in the State Case and in the appellate result in the Federal Case for two reasons. If landowners are held to be intended beneficiaries of the Irrigation Districts' Agricultural CAP Subcontracts, with the power to prevent relinquishment of Subcontract water, the landmark Settlements Act cannot be implemented. The Agricultural CAP Subcontract water voluntary relinquished by agricultural CAP subcontractors (such as the Irrigation Districts) is to be used by the United States to settle current and future Indian water claims. If agricultural subcontractors fail to relinquish sufficient CAP water to enable the Secretary to make the required reallocations, the Settlement Act will fail.

The Settlement Act also allocates up to 96,295 acre-feet of relinquished water to the Director of the Department for future reallocation to Arizona non-Indian municipal and industrial water users. P.L. 108-451, § 104(a)(2). Consequently, the Department has a specific interest in ensuring that the Settlement Act is implemented.

Summary

The question presented in the *Orff* petition before this Court appears, on its face, to be the same question that was ruled on by the Arizona District Court in the Federal Case and by the trial court in the State Case. The underlying facts and law in the *Orff* matter are, however, significantly different from the facts and law in the Federal Case and the State Case. The *Orff* matter involves the San Luis Unit of Central Valley Project, a Reclamation project in

California on the San Joaquin River that is subject to Section 8 of the Reclamation Act. *Amici* express no view as to whether Section 8 confers on the *Orff* Petitioners the rights they assert, but even if it did, the Federal Case and State Case involve the Central Arizona Project, a Reclamation project in Arizona for the delivery of water from the Colorado River. The delivery of Colorado River water is **not** subject to Section 8 of the Reclamation Act.

Amici have a direct interest in ensuring that the differences between the *Orff* case and the Arizona cases in which they are parties are called to the attention of this Court so that the Court's decision is made with recognition of these differences. At stake for the *amici* and for the state of Arizona as a whole is the preservation and implementation of the Settlement twenty years in the making that was recently authorized by Congress and the President.

SUMMARY OF ARGUMENT

The *Orff* petition before this Court presents the question of whether farmers in an irrigation district[9] that is governed by California law and located in a Reclamation project[10] that is subject to Section 8 of the 1902 Reclamation Act (43 U.S.C. §§ 372, 383) are intended third-party beneficiaries of their irrigation district's water service and repayment contracts with the United States.

[9] Westlands Water District.

[10] The San Luis Unit of the Central Valley Project.

The Federal Case and the State Case in which these Arizona *amici* are involved present the questions of:

1) whether landowners in an Arizona irrigation district receiving Central Arizona Project water are owners of Colorado River water rights appurtenant to their land, and

2) whether they are intended third-party beneficiaries of the master repayment contract between CAWCD and the Secretary and the Subcontracts among CAWCD, the Irrigation Districts and the Secretary.

Petitioners describe the history and scope of the Reclamation program undertaken by the United States, through the Secretary and the Bureau of Reclamation ("Bureau") beginning in 1902. Petitioners' Brief on the Merits, at 4. Although the description is generally accurate, it does not take into account the often unique circumstances of the individual Reclamation projects in the program. For instance, Petitioners cite Section 8 of the 1902 Reclamation Act as support for their assertion that "(p)roperty rights are a key feature of the Reclamation program." *Id.* at 3. Section 8 provides that state laws shall govern the control, appropriation, use and distribution of water used in irrigation and that the "right to the use of water" acquired under state laws "shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." Reclamation Act of 1902, c. 1093, § 8, 32 Stat. 388, 43 U.S.C. §§ 372, 383. The general effect of Section 8 is that state water law governs the acquisition of water rights for Reclamation projects, but Section 8 does not apply to water rights in all Reclamation projects.

In particular, it does not apply to post-1928 rights in Colorado River water. Post-1928 Colorado River water is not allocated among the basin states, or between users within those states, based upon prior appropriation or other state law principles. Instead, the seven Colorado River Basin states allocated the river between the Upper and Lower Basins by interstate compact in 1922;[11] and Congress, in the 1928 Boulder Canyon Project Act, 45 Stat. 1057 ("1928 Act"), allocated rights to the river among the three Lower Basin states (California, Arizona, and Nevada) and granted the Secretary of the Interior expansive authority to allocate and contract for the delivery of Colorado River water to the various entities within the states.

After 1928, Colorado River water could be used only by contract with the Secretary, not under or pursuant to state water law. The decision of this Court in *Arizona v. California,* 373 U.S. 546 (1963), clearly confirmed that Section 8 is superseded by the body of law that governs the Colorado River, known collectively as "the Law of the River."

The Petitioners in *Orff* base their claim of intended beneficiary status on their ownership of water rights appurtenant to their land, pursuant to Section 8; the decision of the Federal Circuit Court in *H.F. Allen Orchards v. United States,* 749 F.2d 1571 (Fed. Cir. 1984); and other general federal Reclamation court decisions.[12]

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[11] Reprinted in Ariz. Rev. Stat. §§ 45-1302 to -1310; Boulder Canyon Project Act § 13(a), (45 Stat. 1057, 1064).

[12] *Amici* are not here agreeing with the *Orff* Petitioners that the ownership of appurtenant water rights is determinative of third party beneficiary status. That status is generally determined on the basis of

(Continued on following page)

The status of users of Colorado River water in the Central Arizona Project is, however, clearly not governed by Section 8 and these non-Colorado River cases. *Amici* request that this Court affirm the lower court's decision. If, however, the Court reverses that decision, we urge the Court to recognize in its opinion the fundamental and important differences between the Central Valley Project and the Central Arizona Project.

ARGUMENT

I. SECTION 8 OF THE 1902 RECLAMATION ACT DOES NOT APPLY TO COLORADO RIVER WATER DELIVERED THROUGH THE CENTRAL ARIZONA PROJECT.

A. The Law Of The River

1. The Colorado River Compact

The Colorado River is a navigable watercourse that flows through seven states and Mexico. *See Arizona v. California*, 373 U.S. 546, 552 (1963). Non-Indians in several areas along the Colorado first began diverting water from the river in the late 1800s. *See id.* The erratic nature of the river resulted in alternating periods of floods and droughts during this time. *Id.* at 553. The early farmers in southern California who had been diverting Colorado River water through the Alamo Canal, as well as a few early users in other states, desired to obtain federal

the clear intent of the parties as expressed in the contract. However, since the focus of Petitioners' argument is on Section 8 and asserted appurtenant water rights, *amici* primarily address those issues in this brief.

funding to build flood control and water storage and transmission facilities on the river. *Id.* At the same time, residents and potential users outside California were concerned that the "first in time, first in right" principles of prior appropriation water law might be applied to the river, so that the early California users would acquire a superior right to all or most of the water from the river. *Id.* These residents outside California were concerned that this problem would be further exacerbated if the Federal Government spent money to promote additional early use in California.[13]

To address these concerns, in 1922 representatives of the seven Colorado River Basin states met for several months to discuss an agreement to allocate water from the river. Unable to agree upon an allocation among the individual states, they settled on an allocation between the "Upper Basin" (the area above Lee Ferry in the Grand Canyon) and the "Lower Basin." This compromise is embodied in the 1922 Colorado River Compact. *See id.* at

[13] *See id.* at 555-56 ("The prospect that the United States would undertake to build a national project . . . brought to life strong fears in the northern basin States that additional waters made available by the storage and canal projects might be gobbled up in perpetuity by faster growing lower basin areas, particularly California. . . . These fears were not without foundation, since the law of prior appropriation prevailed in most of the Western States. . . . In 1922, . . . [the United States Supreme Court] held that the doctrine of prior appropriation could be given interstate effect. . . . Nevada, Utah, and especially Arizona were all [also] apprehensive that California's rapid declaration of appropriative claims would deprive them of their just share of basin water available after construction of the proposed United States project.") (citing *Wyoming v. Colorado*, 259 U.S. 419 (1922), *decree vacated*, 353 U.S. 953 (1957), which had applied prior appropriation in a dispute between two states, where both states applied prior appropriation in their internal water allocation).

557-58; *see also* Colorado River Compact, *reprinted in* Ariz. Rev. Stat. Ann. § 45-1311.

Although Arizona's representative signed the Compact, the Compact required that it be ratified by the respective legislatures of the signatory states. The Arizona Legislature refused to ratify the Compact, largely based upon continued concerns that the Lower Basin's share of the river had not been divided among Arizona, California, and Nevada and the possible implications of prior appropriation law on such a future division. *Arizona v. California*, 373 U.S. at 559-60.[14]

2. The 1928 Boulder Canyon Project Act

Congress eventually authorized construction of the proposed Boulder Canyon Project over Arizona's objection, passing the Boulder Canyon Project Act in 1928, 45 Stat. 1057, *codified at* 43 U.S.C. §§ 617-617t. The 1928 Act gave the Secretary of the Interior control over the allocation of Colorado River water among the individual states and among the various entities within those states. The Act also authorized the Secretary to enter into contracts with Arizona, California, and Nevada, with an allocation of Colorado River water as follows: Arizona – 2.8 million acre-feet ("MAF"); California – 4.4 MAF; and Nevada – 0.3 MAF. *See id.* § 617c. Arizona entered into a contract with

[14] "The concept of an allocation between basins quieted the fears of Upper Basin states that California would grab water to their detriment. But Arizona, lying largely in the Lower Basin, still feared that the neighboring Lower Basin state of California would get virtually all the water that new federal facilities would make available below Lee Ferry. Consequently, Arizona refused to ratify the compact." *Waters and Water Rights* § 47.01(b), at 671 (R. Beck, ed.) (1996).

the Secretary for its 2.8 MAF in 1944. *See* Contract for Delivery of Water ("Lake Mead Contract"), *reprinted in* Ariz. Rev. Stat. Ann. § 45-1301. Section 5 of the 1928 Act provided that state law for allocating water did not apply to post-1928 uses of Colorado River:

> The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses. . . . **No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.**

43 U.S.C. § 617d (emphasis added). Section 5 further stated that "[c]ontracts for the use of water . . . shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with the view of meeting the revenue requirements herein provided for." *Id.* § 617d(c).

3. *Arizona v. California*

The 1928 Act clearly established that Colorado River water is allocated exclusively by contract with the Secretary. Although this basic tenet of the Law of the River was set forth in 1928, this Court in *Arizona v. California* made it even more clear. The Court discussed the history of regulation and allocation of the Colorado River and upheld the Secretary's broad authority to allocate such water among the three Lower Basin states and between individual entities in the various states by entering into water delivery contracts with those entities. The Court stated

that, having authorized the use of federal money to build projects on the Colorado River in the 1928 Act, Congress clearly established that the Federal Government would control the use of water from those projects:

> Having undertaken this beneficial project, Congress, in several provisions of the [1928] Act, made it clear that no one should use mainstream [Colorado River] waters save in strict compliance with the scheme set up by the Act. Section 5 authorized the Secretary [of the Interior] "under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river * * * as may be agreed upon, for irrigation and domestic uses * * *." To emphasize that water could be obtained from the Secretary alone, § 5 further declared, "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

373 U.S. at 579-80.

Basing its analysis on the express statements by Congress in the 1928 Act, the Court reiterated that contracts with the Secretary were the exclusive means to allocate legal rights to the waters of the Colorado River, both as among the states and among individual users within the states:

> These several provisions, even without legislative history, are persuasive that **Congress intended the Secretary of the Interior, through his § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water**. The general authority to make contracts normally includes the power to choose with whom and upon what terms the contract will be made. When Congress in an Act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it. . . . Significantly, no phrase or provision indicating that the Secretary's contract power was to be controlled by the law of prior appropriation was substituted either then or at any time before passage of the Act, and we are persuaded that had Congress intended so to fetter the Secretary's direction, it would have done so in clear and unequivocal terms, as it did in recognizing "present perfected rights" [i.e., those rights acquired prior to passage of the 1928 Act] in § 6.

Id. at 580-81 (emphasis added).

In *Arizona v. California* this Court, after discussing the Reclamation Act and the 1928 Act, stated:

> . . . [W]e hold that the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by these sections [e.g., Section 8 of the Reclamation Act] to follow state law. . . . While the States were generally free to exercise some jurisdiction over these waters before the Act was passed, this right was subject to the Federal Government's right to regulate and develop the river. . . . [W]here the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, **state law has no place**.

Id. at 586-88 (emphasis added).

This Court recognized that federal Reclamation projects for the use of Colorado River water are inherently different from other projects and water rights, even those other projects constructed pursuant to the 1902 Reclamation Act. With respect to the interstate and international Colorado River, the Federal Government plays a more pervasive role in constructing and operating project facilities and promoting repayment of costs. The Court concluded its description of the broad authority of the Secretary to contractually allocate Colorado River waters as follows :

> All this vast, interlocking machinery – a dozen major works delivering water according to congressional fixed priorities for home, agricultural, and industrial uses to people spread over thousands of square miles – could function effectively only under unitary management, able to formulate and supervise a coordinated plan that could take account of the diverse, often conflicting interests of the people and communities of the Lower Basin States. Recognizing this, Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power, principally the § 5 contract power, to direct, manage, and coordinate their operation. Subjecting the Secretary to the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow. We are satisfied that the Secretary's power must be construed to permit him, within the boundaries set down in the Act, to allocate and distribute the waters of the mainstream of the Colorado River.

373 U.S. at 589-90.

4. The Colorado River Basin Project Act

The Secretary's exclusive power to allocate the waters of the mainstream of the Colorado River was reaffirmed in 1968 when Congress passed the Colorado River Basin Project Act ("1968 Act"), authorizing construction of the Central Arizona Project. *See* 43 U.S.C. §§ 1501 to 1556. The 1968 Act also provided for the Secretary to enter into "master contracts" for the repayment of CAP construction costs with a single political subdivision of the State of Arizona. *Id.* § 1524. The 1968 Act expressly stated that it "shall not be construed to alter, amend, repeal, modify, or be in conflict with" the 1922 Compact, this Court's 1963 *Arizona v. California* decision, or other portions of the Law of the River. 43 U.S.C. § 1551(a).

II. THE FACTS AND LAW APPLICABLE TO FARMERS IN THE CENTRAL VALLEY PROJECT ARE DIFFERENT FROM THOSE APPLICABLE TO FARMERS IN THE CENTRAL ARIZONA PROJECT.

A. Water Rights

1. The *Orff* Petitioners

The Petitioners in *Orff* claim their water rights under California law and the doctrine of prior appropriation as applied to federal Reclamation projects by Section 8 of the 1902 Federal Reclamation Act. Congress passed the Reclamation Act for the purpose of having the Federal Government play a more prominent role in the development of the West, particularly with respect to the development of water resources. *See Nevada v. United States*, 463 U.S. 110, 115, *reh'g denied*, 464 U.S. 875 (1983). At the same time, however, the states were concerned about

Federal interference in internal water matters. For that reason, Congress included Section 8 of the act, which provides:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383. Therefore, for most federal Reclamation projects, all water rights must be acquired pursuant to state law. For those projects, individual users (or a water users' associations acting expressly on behalf of those individual users) follow state-mandated procedures in order to obtain appropriative rights to water, and those water rights are allocated on a "first in time, first in right" basis. In those situations, the fact that an individual owns land within the boundaries of a federal Reclamation project does not give that person a right to use water *unless* the water right acquisition procedures under state law have been satisfied.

According to Petitioners, the landowners in the San Joaquin Valley applied to the State of California to establish surface water rights on the basis of prior appropriation under California law. In order to proceed with the San Luis Unit of the Central Valley Project, the landowners assigned their state applications to the United States,

which proceeded to obtain water rights under state law. *See* Petitioners' Brief on the Merits, at 4-6. The contracts between the Westlands Water District and the United States contain provisions referring to the farmers' right to use the water and indicate a remedy for not receiving the water "of anyone claiming such right or remedy by or through the District." *Id.* at 20. Each of the contracts was made pursuant to the federal Reclamation law, including Section 8 of the 1902 Act. The *Orff* Petitioners cite four of this Court's decisions for the proposition that the farmers who apply the water in a Reclamation project to their land "equitably own, property rights in the water which are appurtenant to their lands. *Nevada v. United States*, 463 U.S. 110, 121-28 (1983); *California [v. United States*, 438 U.S. 645 (1978)] at 664, 653, 665, 667; *Nebraska v. Wyoming,* 325 U.S. 589, 611-16 (1945); *Ickes v. Fox*, 300 U.S. 82, 93-96 (1937)." Petitioners' Brief on the Merits, at 21. They also rely on *Allen Orchards,* in which the court stated: "it was undisputed that appellants [landowner/farmers] have a property right in the water to the extent of their beneficial use thereof." *Id.* at 26; *Allen Orchards,* 749 F.2d at 1576.

The *Orff* Petitioners summarize their position regarding ownership and appurtenance of the water rights as follows:

> The farmers equitably own the water rights which were perfected and are preserved by their use of the very water sold and delivered under the 1963 contract. They do not simply enjoy an indirect economic benefit as a result of its use. They hold a property right in its usage which is appurtenant to their lands.

Id.

2. Smiths in Arizona

The contrast between the *Orff* Petitioners and Smiths in the Arizona cases is striking. Smiths made no efforts to acquire appropriative rights in Colorado River water under Arizona law and no efforts to assign any such rights to the United States for the Central Arizona Project. Unlike the situation in the San Luis Unit of the Central Valley Project, the Secretary needed no state law water rights to establish and operate the CAP. Again, unlike the San Luis Unit, there was no need for a landowner to put the contract water to use in order to perfect and protect a state water right. And unlike the San Luis Unit, the provisions of Section 8 of the 1902 Act do not have any application to Colorado River water delivered through the Central Arizona Project. So the bases on which the *Orff* Petitioners claim appurtenant water rights simply do not exist with regard to the Central Arizona Project.

3. *California v. United States, Nevada v. United States, Nebraska v. Wyoming,* and *Ickes v. Fox*

The four Supreme Court cases Petitioners cite for their assertion of equitable ownership of appurtenant water rights all rely on Section 8 and do not involve Colorado River water.

a. *California v. United States*

In *California v. United States,* the dispute involved rights to the Stanislaus River under the Central Valley (California) Project. 438 U.S. at 645. The Bureau of Reclamation, on behalf of the Project landowners, applied for a permit to appropriate water from the California State

Water Resources Control Board. *Id.* at 652. Although the controversy in the case involved what conditions the State Board could impose on the Bureau's application, there was no disagreement that Section 8 of the Reclamation Act required the Bureau to apply for a state law prior appropriative right. *See id.*

Although one could argue that *California v. United States* overturned the general holding in *Arizona v. California* with respect to the 160-acre limitation by "disavow[ing] the dictum" from *Ivanhoe* and *City of Fresno,*[15] it cannot be said that the *California v. United States* Court overturned the *Arizona v. California* decision regarding the supremacy of Section 5 of the 1928 Act over Section 8 of the Reclamation Act with respect to Colorado River water delivery rights.

The *California v. United States* Court itself acknowledged the independent basis for the Court's holding in *Arizona v. California*:

> In *Arizona v. California*, the States had asked the Court to rule that state law would control in the distribution of water from the Boulder Canyon Project, a massive multistate Reclamation project on the Colorado River. After reviewing the legislative history of the Boulder Canyon Project Act, 43 U.S.C. § 617 *et seq.*, the Court concluded that because of the unique size and multistate scope of the Project, Congress did not intend the States to interfere with the Secretary's power to determine with whom and on what terms water contracts would be made.

[15] *Ivanhoe Irr. Dist. v. McCracken,* 357 U.S. 275 (1958); *City of Fresno v. California,* 372 U.S. 627 (1963).

> **While the Court in rejecting the States' claim repeated the language from *Ivanhoe* and *City of Fresno* as to the scope of § 8, there was no need for it to reaffirm such language except as it related to the singular legislative history of the Boulder Canyon Project Act.**

438 U.S. at 674 (emphasis added, citations omitted). Thus, the *California v. United States* Court acknowledged that, as to the allocation and use of Colorado River water, the specific provisions of Section 5 of the 1928 Act controlled over the general provisions in Section 8 of the Reclamation Act.

Courts since *California v. United States* have agreed that any criticism or limitation of *Arizona v. California* in that opinion related to the scope of Section 8 in a general sense and not to the interaction between Section 5 and Section 8. For example, in 1980, this Court was faced with the 160-acre limitation issue with respect to the Imperial Valley farmers in California. *Bryant v. Yellen*, 447 U.S. 352, *reh'g denied*, 448 U.S. 911 (1980). Noting the discussion of *Arizona v. California* in *California v. United States*, the *Bryant* court stated:

> In *Arizona v. California*, we held that the [1928 Act] vested in the Secretary the power to contract for project water deliveries independent of the direction of § 8 of the Reclamation Act to proceed in accordance with state law and of the admonition in § 18 of the [1928 Act] not to interfere with state law. . . . In terms of Reclamation law generally, the import of the Court's opinion in this respect was considerably narrowed in *California v. United States*, 438 U.S. 645, 98 S. Ct. 2985, 57 L.Ed.2d 1018 (1978), **but the latter case did not question the description of the Secretary's power under the [1928 Act] itself.**

447 U.S. at 370-71 & n.21 (emphasis added).

The Ninth Circuit came to the same conclusion in an appeal of a subsequent Arizona case. *Long v. Salt River Valley Water Users' Ass'n*, 820 F.2d 284 (9th Cir. 1987). In that opinion, the court stated:

> Neither section 8 of the 1902 [Reclamation] Act nor the [1928 Act's] general statement of intent not to interfere with the states' rights to regulate water use within their borders, 43 U.S.C. § 617q, requires the Secretary to follow state law in allocating water among users within a particular state. *Arizona v. California*, 373 U.S. at 585-86, 83 S.Ct. at 1490. The Supreme Court in *California v. United States*, 438 U.S. at 674-75, 83 S.Ct. at 3000-01, disavowed dictum in *Arizona v. California*, 373 U.S. at 586-87, 83 S.Ct. at 1490-91, that 1902 [Reclamation] Act § 8 did not require the Secretary to comply with state law in distributing project water, even when that state law was not inconsistent with specific federal statutory requirements. However, the *California v. United States* decision "did not question the description of the Secretary's powers under [1928 Act] itself." *Bryant v. Yellen*, 447 U.S. 352, 370 n. 21, 100 S. Ct. 2232, 2242 n. 21, 65 L.Ed.2d 184 (1980).

820 F.2d at 287 n.4 (emphasis added).

The *Arizona v. California* decision that Section 5 of the 1928 Act supersedes Section 8 of the 1902 Reclamation Act with respect to Colorado River water remains the law. *California v. United States* did not address and does not

apply to Colorado River Water delivered through the Central Arizona Project.

b. *Ickes v. Fox, Nebraska v. Wyoming,* and *Nevada v. United States*

Ickes v. Fox established in 1937 that landowners in the Yakima Project who put Reclamation project water to beneficial use on their lands acquired an appurtenant water right under state law. The decision was based on Section 8 of the 1902 Reclamation Act. In 1945, this Court cited *Ickes* with approval in *Nebraska v. Wyoming* and again held that, pursuant to Section 8 of the 1902 Reclamation Act, individual landowners who appropriate Reclamation project water and put it to beneficial use acquire an appurtenant water right. Neither *Ickes* nor *Nebraska* was held in *Arizona v. California* in 1963 to be applicable to the Colorado River.

Again in *Nevada v. United States,* this Court cited *Ickes* and *Nebraska* in holding that landowners in the Newlands Reclamation Project held appurtenant beneficial interests in the water rights when the water was put by them to beneficial use on the land. Section 8 of the 1902 Reclamation Act clearly applied to the Newlands Reclamation Project. That project deals with the Truckee River and the Carson River. It does not involve any Colorado River water. The *Nevada* decision also has no application to the delivery of Colorado River water.

B. The *Allen Orchards* Case

The *Orff* Petitioners cite *Allen Orchards* as the seminal federal decision establishing the principle that ownership of the water rights in a Reclamation project gives the

landowners third-party beneficiary status under the project's water service and repayment contracts. In *Allen Orchards,* the Federal Circuit Court of Appeals, after holding that the plaintiff irrigators had failed to state a claim for relief, stated that the landowner farmers as "owners" of the water were "intended beneficiaries of the 1945 Consent Decree." 749 F.2d at 1576. The basis for this statement that the farmers were owners of the water was the decision in *Fox v. Ickes,* 137 F.2d 30 (D.C. Cir. 1943). There, the court held that irrigators in the Yakima Project in Washington owned a property right acquired by the beneficial use of water and went on to state that "the water-rights here are not based upon the construction or enforcement of contracts with the government." *Id.* at 35. The project in *Allen Orchards* was also the Yakima Project in Washington – a traditional Reclamation project of the type described on pages 1-4 of the Petitioner's Brief on the Merits where the provisions of Section 8 of the Reclamation Act apply.

The Reclamation project at issue in the Federal Case and the State Case, in which three of these *amici* are involved, is the Central Arizona Project. The CAP is not a traditional Reclamation project like the Yakima Project. Because of Section 5 of the 1928 Act, Section 8 does not apply to Colorado River water. The predicate used by the Federal Circuit in *Allen Orchards* for stating that irrigators are intended beneficiaries of Reclamation project contracts does not exist with regard to Central Arizona Project water.

C. Contractual Provisions

The *Orff* Petitioners cite a number of provisions in the contracts between the Bureau and the Westlands Water District to support their assertion of third-party beneficiary status. There are, however, significant differences between the Westlands contracts and the CAP Agricultural Subcontracts.

- The *Orff* Petitioners rely on Article 15 of the 1963 Westlands contract, which refers to the "right to any water" furnished thereunder possessed by any "tract of land or water user" in the district. Petitioners' Brief on the Merits, at 28. There is no such language in the CAP Agricultural Subcontracts. *See* Subcontract Subarticles 4.1, 4.3, 4.13, App. 164, 179.

- The *Orff* Petitioners also point to the reference in Article 9(c) of the Westlands contract to "those" claiming by, "through or under" the district. Petitioners' Brief on the Merits, at 30. There is no such reference in the CAP Agricultural Subcontracts. *See* Subcontract Subarticle 6.7, App. 189.

- The *Orff* Petitioners assert that references in the contracts to California law establish that the landowners equitably own appurtenant water rights under the California state law doctrine of prior appropriation and were, as a result, intended beneficiaries under the contracts. Petitioners' Brief on the Merits, at 35-36. In contrast, Smiths do not equitably own appurtenant water rights under the Arizona doctrine of prior appropriation. That doctrine does not apply to the Colorado River after 1928. Only through a contract with the United States can any right to use Colorado River water be established. Smiths have no such contract. Nor have they ever put any Colorado River water

received by the Irrigation Districts under their Subcontracts to any use. The only Colorado River water the Irrigation Districts have received has been "excess" CAP water made available under Excess Water Contracts at a low price, not higher-priced Subcontract water. *See* Exhibit A to CAIDD Statement of Facts, Affidavit of Paul Orme, ¶ 9, App. 205.

IV. CONCLUSION

In sum, the arguments presented in the *Orff* Petitioners' Brief on the Merits are, for the most part, predicated on their asserted ownership of appurtenant water rights under Section 8 of the 1902 Act which makes California law applicable. These arguments do not apply to landowners receiving Colorado River water pursuant to CAP subcontracts. Section 8 does not apply, nor does Arizona prior appropriation law. Whether the *Orff* Petitioners are or are not third-party beneficiaries of the Westlands contracts or the 1963 stipulated judgment, there can be no uniform rule that landowners in all federal Reclamation projects are always third-party beneficiaries of contracts between irrigation districts and the United States. A separate determination must be made in each case based on the facts and law applicable to each individual situation.

Amici respectfully request that this Court affirm the lower court's decision. If, however, this Court should decide to reverse the lower court's decision in the *Orff* case, *amici* request that the opinion specifically acknowledge that its conclusions do not apply to the Central

Arizona Project or to Reclamation projects in which the underlying facts and law differ from those present in *Orff*.

Respectfully submitted,

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January 6, 2005

No. 03-1566

In The
Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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APPENDIX TO *AMICI CURIAE* BRIEF OF CENTRAL ARIZONA WATER CONSERVATION DISTRICT, MARICOPA-STANFIELD IRRIGATION & DRAINAGE DISTRICT, CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICT AND ARIZONA DEPARTMENT OF WATER RESOURCES IN SUPPORT OF RESPONDENTS

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

John E. Smith and Mary Lou Smith, husband and wife; John E. Smith, as Trustee of the Smith Family Trust; Pretzer Land and Cattle Company, an Arizona corporation, Plaintiffs, vs. Central Arizona Water Conservation District, Defendant.	No. CIV 03-0505-PHX-EHC **ORDER** (Filed Sep. 12, 2003)

Pending before the Court are (1) Defendant's Motion to Dismiss [Dkt. 6]; (2) Plaintiffs' Petition to Abstain and Remand to State Court [Dkt. 10]; (3) Plaintiffs' Motion to Stay Motion to Dismiss [Dkt. 13]; (4) Plaintiffs' Motion for Two-Day Extension for Their Supplemental Memorandum in Support of Their Motion to Abstain and Remand and Their Supplemental Memorandum in Support of Their Response to Motion to Dismiss by Defendant [Dkt. 34].

I. Background

Plaintiffs John E. Smith, Mary Lou Smith, and the Smith Family Trust are landowners in Maricopa-Stanfield Irrigation and Drainage District ("MSIDD"). Plaintiff Pretzer Land and Cattle Company is a landowner in Central Arizona Irrigation and Drainage District ("CAIDD"). MSIDD and CAIDD are collectively referred to as the "Irrigation Districts."

The Arizona legislature created Defendant Central Arizona Water Conservation District ("CAWCD") in 1971. CAWCD was formed in relevant part to contract with the United States to finance reimbursement of construction and operation of Central Arizona Project ("CAP") to the federal government. In connection with that responsibility, CAWCD was authorized to subcontract with the Irrigation Districts who in turn could levy property taxes on landowners in their districts to subsidize its operating expenses and assist CAWCD in meeting its repayment obligations to the United States. *See* A.R.S. §§ 48-3701 *et seq.*

In 1968, Congress passed the Colorado River Basin Project Act ("Project Act.") The Project Act authorized construction of the CAP to store and deliver 2.8 million acre-feet of Colorado River water to Arizona and western New Mexico for irrigation as well as Municipal and Industrial ("M&I") use. *See* 43 U.S.C. §§ 1501, 1521.

On December 15, 1972, the United States and CAWCD entered into a contract. ("Master Contract"), under which the United States agreed to build CAP, and CAWCD agreed to repay its allocable costs.[1] On November 21, 1983, the Irrigation Districts executed subcontracts ("Subcontracts") with CAWCD and the United States. CAWCD agreed to deliver non-Indian Agriculture ("NIA") priority CAP water to the Irrigation Districts in return for payment of the Operation, Maintenance and Replacement

[1] The first action before this Court dealt with the repayment costs under the Master Contract. *Cent. Ariz. Water Conservation Dist. v. United States*, 32 F. Supp. 2d 117 (D. Ariz. 1998). ("Repayment litigation.")

costs ("OM &R") for the water delivered.[2] Plaintiffs thereafter executed a Memorandum of Understanding ("MOU") with the Irrigation District they were members of The United States and CAWCD were not parties to the MOU and never approved the MOU.

Under the MOU, signatory landowners agreed to execute agricultural water service contracts provided that "the right to receive Project Water . . . will form a part of the appurtenances to the Lands; such water is a direct benefit to the Lands and the covenants of Landowner to pay for said water and other obligations under the Contract shall run and bind said Land." [Plaintiffs' Response to Motion to Dismiss, Dkt. 11, p.8]. Each MOU also provided that each signatory landowner would grant immediate possession and convey to the irrigation districts the landowners' wells, pumping equipment, appurtenances, rights and privileges under the Arizona Groundwater Management Act.

By 1990, CAIDD and MSIDD were unable to pay the entire debt or pay full cost for CAP water. CAIDD filed bankruptcy, and MSIDD restructured its debt with its bondholders and the United States. In order to restructure the CAP repayment scheme, CAWCD entered into a letter agreement with Irrigation District subcontractors (including CAIDD and MSIDD) for the water years 1994-2003.

[2] CAWCD asserts that under the original Subcontracts MSIDD and CAIDD are obligated to pay the fixed OM&R costs for all CAP water to which the districts are entitled, whether the water is ordered or not. The Subcontracts also contained provisions regarding converting from agricultural to M&I water use and provided contingencies for the re-allotment of water should CAWCD be unable to deliver the Irrigation Districts contracted allotment.

Following the policy, the Irrigation District waived its rights to receive agricultural water pursuant to the Subcontract, and its right to convert (from agricultural) to M&I use. In exchange, CAWCD waived its right to receive fixed OM&R payments and penalties, and sold excess CAP water to the districts at essentially energy only cost[3] The practical result of the letter agreement was to make CAP water affordable to landowners within the districts.

The Repayment litigation was a complex dispute, between the United States and CAWCD over the repayment of the cost of constructing the CAP canal. The parties entered into a stipulation terminating the litigation upon the occurrence of a number of conditions.[4] One of the conditions is the relinquishment and the transfer of NIA CAP water to the Gila River Indian Community and to the Tohono O'odham Nation. The inducement for NIA districts (like CAIDD and MSIDD) to permanently relinquish their water rights under the Subcontract for some or all of the land in their district is 9(d) debt relief; Reclamation Reform Act exemption, and excess CAP water delivered to them by CAWCD at essentially energy only rates through the year 2030 (for the land which the Subcontract rights are relinquished). As to the land for which there is no relinquishment, the Subcontract rights and obligations would remain in effect.

[3] The United States was not a party to the letter agreements and challenged the validity of them in the Repayment litigation.

[4] Defendants and Interveners allege that if Plaintiffs are successful in preventing MSIDD from relinquishing the Subcontracts, the settlement package of the Repayment litigation will fail because one of the conditions of the settlement package (that 197,500 acre feet of CAP water be available to the United States to deliver to Indian tribes) will not be possible.

Plaintiffs filed suit in Pinal County Superior Court in March 2003 seeking declaratory relief under Arizona's Uniform Declaratory Judgments Act[5] *See* A.R.S. §§ 12-1831 *et seq.* Plaintiffs' claim relied upon alleged vested property rights to Reclamation water based on the Federal Reclamation Act of 1902, the Boulder Canyon Project Act, ("Boulder Canyon Project"), and all amendatory and supplementary Acts. *See. e.g,* 43 U.S.C. § 372 *et seq.,* 43 U.S.C. § 617 *et seq.* Defendant asserts this Court has original jurisdiction pursuant to 28 U.S.C. § 1331 and removed pursuant to 28 U.S.C. § 1441.

Plaintiffs contend a justiciable controversy exists because Plaintiffs have vested property rights in Arizona's Colorado River entitlement by reason of the CAP Subcontracts. Plaintiffs further assert CAWCD cannot interfere with Plaintiffs' rights to receive CAP water, and that CAWCD is obligated to deliver CAP water to MSIDD or CAIDD for the Plaintiffs' benefit. Plaintiffs allege they are third-party beneficiaries to the Subcontract and thus have standing. Defendant asserts Plaintiffs fail to state a claim upon which relief can be granted because there is neither a direct contractual relationship between Defendant and Plaintiffs, nor are Plaintiffs intended beneficiaries to either the Subcontracts or the Master Contract. Fed. R. Civ. Pro. 12(b)(6). Alternatively, Defendant moves to dismiss because Plaintiffs failed to join the United States, an indispensable party. Fed. R. Civ. Pro. I 2(b)(7), 19.

[5] In March of 2003 Plaintiffs filed a separate suit in Pinal County, Superior Court against CAIDD and MSIDD seeking to prevent the districts from relinquishing the Subcontracts, which they allege created legally and equitably vested appurtenant rights of Plaintiffs to receive NIA priority CAP water. The case is currently pending.

II. Analysis

Plaintiffs fail to cite any controlling authority for the proposition that the court should stay the Motion to Dismiss pending the resolution of the Motion to Abstain or Remand. Thus, the Court will address both the Motion to Dismiss and the Motion to Remand.

A. Remand

"An action filed in state court may be removed only if the district court could have exercised jurisdiction over the action if originally filed there," *Duncan v. Stuetzle,* 76 F.3d 1480, 1485 (9th Cir. 1996) (citing *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392, 107 S.Ct. 2425, 2429 (1987)). "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Plaintiffs base their claims of vested property rights to Colorado River reclamation water on § 8 of the Reclamation Act of 1902[6] and support this claim with references to Congressional intent from the Boulder Canyon Project Act, 43 U.S.C. § 617 *et. seq.,* and the Colorado River Basin Project Act, 43 U.S.C. § 1501 *et seq.* The only question of state law Plaintiffs assert is their entitlement to a declaratory judgment of their rights under contracts to which they are not parties. The contracts in question (the Master Contract and the Subcontracts) are based on federal Reclamation law and the United States is a party to both contracts.

[6] "The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372.

A declaration of Plaintiff's rights under these contracts involves interpretation of a contract "arising under" federal Reclamation law, and thus is a federal question.

Additionally, Plaintiffs argue this case should be remanded because "the legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *California v. United States,* 438 U.S, 645, 675, 98 S.Ct. 2985, 3001 (1978). The legislative history of the Reclamation reiterates this sentiment but also contemplates that only the Federal government can build the "reservoirs and main line canals" necessary to reclaim the arid desert lands for settlement and that "the cost of constructions so far as possible (should) be repaid by the land reclaimed." *Id.* (citing HR., Doc, No. 1 (1901)). The federal government has not been fully repaid for the cost of construction of the CAP canal by the Irrigation Districts or the benefitted landowners. The subcontracts entered into by CAIDD and MSIDD attempt to repay the cost of construction, and Plaintiffs' suit undermines their efforts to do so. Nothing within the text of the Reclamation Act of 1902, subsequent Reclamation acts, or any Arizona or federal case law decisions supports the idea that Plaintiffs should be entitled to reclamation water without paying the cost of the project that made the water attainable. Because Plaintiffs seek a declaration of their rights under a contract to which the United States was a party, state law is not controlling. Plaintiffs fail to cite any exceptional circumstances that would make remand appropriate.

B. Abstention

In the alternative to remanding, Plaintiffs ask this Court to stay this action pending resolution of proceedings in state court. Plaintiffs argue "wise judicial administration . . . counsels that decision of the federal question be deferred until the potentially controlling state-law issue is authoritatively put to rest." *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134, 135-36, 82 S.Ct 676, 677 (1962) (citing *Leitner Minerals Inc. v. United States,* 352 U.S. 220, 228-29, 77 S.Ct 287, 292 (1957)). *United Gas* involved the interpretation of an Alabama state License Code and the intent of the Alabama State legislature in enacting the Code. *Leitner* involved the interpretation of a Louisiana statute. As the present case involves neither interpretation of a state statute, nor a federal constitutional issue which can be deferred pending a state court decision, abstention under *United Gas* or *Leitner* is not warranted.

Plaintiffs also call for an abstention under the *Colorado River* doctrine, when "federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial policy concern." *Kern-Tulare Water Dist. v. City of Bakersfield,* 828 F.2d 514, 516 (9th Cir. 1987). "The circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited that the circumstances appropriate for abstention." *Colorado River Water Conservation Dist v. United States,* 424 U.S. 800, 818, 96 S.Ct. 1236, 1246 (1976). Plaintiffs urge an "inquiry into the scope of the pending state court proceeding" maybe necessary before a district court removes a case from state court.

Brillhardt v. Excess Ins. Co. of America, 316 U.S. 491, 495, 62 S.Ct. 1173, 1176 (1942). The proceedings in state court involve a contractual dispute between Plaintiffs and the respective irrigation districts, MSIDD or CAIDD, in which they are members. Plaintiffs filed separate lawsuits against the irrigations districts and CAWCD in Pinal County Superior Court.

In this case, Plaintiffs seek a declaration of their property rights under the Master Contact, based on federal Reclamation laws between the United States and CAWCD, and the Subcontracts, also based on federal Reclamation law, between the United States, CAWCD and either MSIDD or CAIDD. "Federal law governs the interpretation of contracts entered into pursuant to federal law where the government is a party." *O'Neill v. United States,* 50 F.3d 677, 682 (9th Cir. 1995) (citing *Kennewick Irrigation Dist. v. United States,* 880 F.2d 1018, 1032 (9th Cir. 1989)). "Federal courts have a 'virtually unflagging obligation' to exercise the jurisdiction conferred on them . . . a district could nonetheless abstain from the assumption of jurisdiction over a suit in 'exceptional' circumstances." *Wilton v. Seven Falls Co.,* 515 U.S. 277, 284 115 S.Ct 2137, 2141 (1995) (citing *Colorado River,* 424, U.S. at 813, 818-820, 96 S.Ct. 1236, 1246-1248 (1976)).[7]

[7] In *Wilton,* the Court stated several *circumstances* that would support a finding of exceptional circumstances, including "the absence of any proceedings in the District Court...and the prior participation of the Federal Government in related state proceedings." *Id.* at 284, 115 S.Ct at 2141. The interpretation of the Master Contract and Subcontracts, where CAWCD, the irrigation districts and the United States were parties or interveners, has already been the subject of a lengthy proceeding in this Court.

"Several factors must be considered in deciding whether the exceptional circumstances are present that make it proper to apply *Colorado River* abstention. These factors are: (1) which court first assumed jurisdiction over the property in dispute; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; and (4) the order in which jurisdiction was obtained." *American Intern. Underwriters (Philippines), Inc. v. Continental Ins. Co.*, 843 F.2d 1253, 1257 (9th Cir. 1988) (citing *Colorado River*, 424 U.S. at 818, 96 S.Ct. at 1246-47), While the state court first assumed jurisdiction, the federal forum is not inconvenient because counsel for both Plaintiffs and Defendant reside in Maricopa county. Moreover, no danger of piecemeal litigation exists as Plaintiffs themselves filed two separate lawsuits. An abstention under *Colorado River* would be inappropriate.

C. Motion to Dismiss

CAWCD seeks dismissal of this action for failure to state a claim and failure to join an indispensable party. CAWCD argues Plaintiffs fail to state a claim for declaratory relief because they are neither parties nor third party beneficiaries to the federal contracts at issues. Alternatively, CAWCD seeks dismissal because Plaintiff's have failed to join the United States an indispensable party. Because this Court concludes Plaintiffs have failed to state a claim, it need not reach the alternative basis for dismissal.

Plaintiffs argue that under Arizona law they are entitled to seek a declaratory judgment, even if they are not parties to the contract in question, A.R.S. §§ 12-1831 *et seq.; See Foster v. Thunderbird Irrigation Water Delivery*

District of Pinal County, 125 Ariz. 324, 609 P.2d 594 (App. 1980), *Trico Electric Cooperative Inc. v. Ralson,* 67 Ariz. 358, 196 P.2d 470 (1948). "A plaintiff, however, in order to be entitled to relief; must have a legal, protectible interest . . . his pleading must present a state of facts showing he has a present legal right against the defendant" *Riley v. Cochise County,* 455 P.2d 1005, 1009 (Ariz. App. 1969). "When the defendant has no power to affect the plaintiff's right, no controversy is present." *Id.* at 1010. In *Foster,* the defendant was in violation of a specific statute regarding the installation of water meters, which the defendant had the ability to control. In *Trico,* the court held that users of water and electric energy supplied by a public utility may question the validity of a contract affecting such utility service under the Arizona Declaratory Judgment Act.[8] Here, Defendant is not disturbing the delivery of water; Plaintiffs are seeking a declaration of their vested property rights under a contact to which Defendant is merely a party. Defendant has no power to affect Plaintiffs' alleged rights.

In order to entitle Plaintiffs to a declaration of their rights under the Arizona Declaratory Judgment Act, A.R.S. §§ 12-1831 *et seq.,* a legal relationship in which Plaintiffs have a definite interest must exist. *Morris v. Fleming,* 625 P.2d 334, 336, 128 Ariz. 271, 273 (Ariz. App. 1980). Plaintiffs argue they are intended beneficiaries of the Master Contract and Subcontract because they have the equivalent interest of present perfected rights (PPR's)

[8] In *Trico,* Plaintiffs alleged, and the court agreed, that Defendant Trico Elec. Corp. had entered into an option agreement (which affected utility service) that was outside the powers conferred on the corporation by its charter.

to Colorado River water. "The Supreme Court has defined PPR's as those rights to water from the Colorado River system existing as of June 25, 1929." *Mohave Valley Irrigation & Drainage Dist. v. Norton,* 244 F.3d 1164, 1165 (9th Cir. 2001); *see also Arizona v. California* 373 U.S. 340, 341, 83 S.Ct. 755, 756 (1964). Plaintiffs proffer no argument as to why their rights are legally analogous to PPR's. The CAP canal, which enables water to be delivered to Plaintiffs, was not authorized until 1968.

"To sue as a third-party beneficiary of a contract, the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party." *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 2001). "Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary." *Id.* (citing Restatement (Second) of Contracts § 313 (2)). "Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested." Restatement § 313 cmt. a. "An incidental beneficiary acquires . . . no right against the promisor or the promise." *Id.* § 315.

Plaintiffs have failed to show they are more than incidental beneficiaries of either the Master Contract or the Subcontracts.

Accordingly,

IT IS ORDERED that Plaintiffs' Motion to Stay Defendant's Motion to Dismiss [Dkt. 13] is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Abstain and Remand [Dkt 10-1, 10-2] is **DENIED**.

IT IS FURTHER ORDERED that Defendant's motion to Dismiss [Dkt. 6] is **GRANTED**, and this action is hereby dismissed.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Two-Day Extension for Their Supplemental Memorandum in Support of Their Motion to Abstain and Remand and Their Supplemental Memorandum in Support of Their Response to Motion to Dismiss by Defendant [Dkt. 34] is **GRANTED**.

IT IS FURTHER ORDERED that the Motion of Marathon Farming Investments L.L.C. and Maricopa Stanfield Landowners Association Members to Intervene is **DENIED** as moot. [Dkt. 20].

IT IS FURTHER ORDERED that the Clerk enter judgment in favor of Defendants and that Plaintiffs take nothing by this action.

DATED this 11th day of September, 2003,

/s/ Earl H. Carroll

Earl H. Carroll
United States District Judge

IN THE SUPERIOR COURT

PINAL COUNTY, STATE OF ARIZONA

DATE: 11/08/2004

Filed in Court
Record
Date Filed: 11/16/2004
Time Filed: 10:21 AM

HON KELLY MARIE ROBERTSON
Division: 3
Court Reporter: NONE

KRISTI YOUTSEY RUIZ, CLERK
By,
BARBARA J. NICLOY
Deputy Clerk.

JOHN E SMITH, et al.,
Plaintiff(s),
vs.
MARICOPA-STANFIELD IRRIGATION & DRAINAGE DISTRICT, et al.,
Defendant(s).

CV200100924
MINUTE ENTRY ACTION:
RULING ON MOTION(S)/ISSUE(S)

PRESENT:

The Court having considered the arguments and the motions of the parties as well as the differing views of the law clerks, does FIND for the plaintiffs on the requests made prior to oral argument in early August of 2004. The Court notes there are new pending matters and this finding does not address those concerns. While the issue is complex and plaintiffs' counsel will be allowed to submit proposed findings of facts and conclusions of law not inconsistent with this minute entry, the Court makes the

following simplified observations in holding for the plaintiff:

PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT

The Plaintiffs move for Summary Judgment on two counts. Count One is a complaint for Special Action. The Plaintiff landowners ask the Superior Court of the State of Arizona (the Court) to issue an order prohibiting Maricopa-Stanfield Irrigation and Drainage District (MSIDD) and Central Arizona Irrigation and Drainage District (CAIDD) from entering into negotiations for a new contract with the Central Arizona Water Conservation District (CAWCD). Count Two is a request for Declaratory Judgment. The landowners also ask the Court to issue an order enforcing the existing contracts between the CAWCD, MSIDD and CAIDD, as well as the contracts between the individual landowners and MSIDD and CAIDD (the Districts).

STATEMENT OF FACTS

There are five contracts that relate to the parties of this case. First, the master contracts are repayment contracts between the United States and the CAWCD for the costs of diverting water through the Central Arizona Project (CAP) canals and its features. Second, in the subcontracts, CAWCD and the United States entered into individual contracts with various Arizona entities for the delivery of CAP water. The districts, MSIDD and CAIDD, were organized to deliver water, including CAP water, to individual landowners. Third, the Districts entered into memoranda of understanding (MOUs) with the individual landowners. Fourth, following the MOUs, the individual

landowners, including the plaintiffs, entered into service contracts with the Districts. Prior to the service contracts, the plaintiffs' lands were certified by the State of Arizona as land qualifying for Irrigation Grandfathered Rights. Finally, interim contracts were created on ten year terms when the Districts and the landowners realized the costs of the service contracts were too expensive.

FINDINGS AND AUTHORITIES

PLAINTIFFS ARE ENTITLED TO RELIEF, BECAUSE THEY ARE AFFECTED BY THE VALIDATED SUB-CONTRACTS

A. CAP Water is Acquired Under the Provisions of *The Reclamation Act of 1902*.

If CAP water is "water acquired under the provisions of this Act," then the right to CAP water runs appurtenant to the land. 43 U.S.C. § 8, The Court in *Arizona v. California*, 573 U.S. 546 (1963), interpreted the Boulder Canyon Project Act, which allocates 2.8 million acre-feet of Colorado River water to Arizona, as a supplement to the Reclamation Act. The Boulder Canyon Project Act authorizes the Secretary of the Interior to allocate and store Colorado River water subject to the provisions of the reclamation law. *Id.* at 584. The Boulder Canyon Project Act does not provide alternatives to the appurtenant rights at issue. 43 U.S.C. § 617. The Colorado River Basin Project Act followed in 1968. 43 U.S.C. § 1524(b)(1). This act authorized CAP construction, authorized the Secretary of the Interior to allocate water to central Arizona, and authorized subcontracts. *Id.* The preamble to the subcontracts refers to the Reclamation Act. Therefore,

the CAP water that reaches the plaintiffs is "water acquired under the provisions" of the Reclamation Act and the rights run appurtenant to the land.

B. *Application*

The service contracts, that are secondary to the subcontracts, were created between the districts and the plaintiffs. The contracts allow the districts to use water from the landowners' grandfathered groundwater and irrigation wells. The service contracts also specify that the landowners are entitled to receive CAP water as well as ground water. Because the CAP water is acquired under the provisions of the Reclamation Act and the plaintiffs entered into these service contracts, they are contractually vested with the right to convert one acre-foot of NIA CAP water for M & I purposes if the water is not required for irrigation. As stated above, the rights vested in the individual landowners are attached to the land. 43 U.S.C. § 8. If the districts enter into new subcontracts, modify the existing subcontracts, or relinquish the existing subcontracts, the Districts will infringe upon the plaintiffs' rights to convert CAP water for M & I purposes, as well as making the land unsuitable for commercial agriculture, thus decreasing the value of the land.

SINCE **CAP** WATER IS ATTACHED TO THE LAND, THEN **CAWCD, MSIDD,** AND **CAIDD** CANNOT CHANGE THE VESTED CONTRACTURAL RIGHTS OF THE PLAINTIFFS WITHOUT THEIR CONSENT.

C. *Arizona Law Applies to the Validation Proceedings and the Subcontracts.*

State law applies to the design, construction and completion of the Reclamation projects. The

Reclamation Act creates property rights in the landowners who receive the project water; therefore, because property law is vested in state courts, the water rights laws of the state apply. *California v. United States*, 438 U.S. 645, 677 (1978). The landowners made payments and complied with obligations of the service contracts, so they are vested with a right to perpetual use of the CAP water that is appurtenant to their land. *Ickes v. Fox*, 300 U.S. 82, 94 (1937). The United States Supreme Court in *Ickes* also found that state law applies. *Id.* The Supreme Court held that "the appropriations under *state law* were made to the individual landowners pursuant to the procedure which Congress provided in the Reclamation Act . . . [and] we are dealing here only with an allocation, through the States, of water rights among appropriators." *Nebraska v. Wyoming*, 325 U.S. 589, 615 (1975).

a. *Arizona Declaratory Statutes are Liberally Construed*

"Under the declaratory judgment act a justiciable controversy exists if there is 'an assertion of a right, status or legal relation in which the plaintiff has a definite interest and a denial of it by the opposing party." *McMann v. City of Tucson*, 202 Ariz. 468, 474, 47 P.3d 672, 678 (2002). Arizona's Declaratory Judgment Act is to be liberally construed and administered. *Podol v. Jacobs*, 65 Ariz. 50, 54, 173 P.2d 758, 761 (1946). In *Trico Electric Cooperative, Inc. v. Ralston*, 67 Ariz. 358, 366, 196 P.2d 470, 474 (1948), the plaintiffs were granted the right to "question . . . the validity of the contract (to which they were not a party) affecting such utility service, determined by a declaration of the

rights, status and legal relations thereunder." The *Trico* case was determined by a declaration of rights under the subcontracts affecting the plaintiffs water service. *Id.*

b. *Plaintiffs are Third Party Beneficiaries to the Validated Subcontracts.*

Sole beneficiary status is not necessary for the plaintiff landowners to be determined third party beneficiaries. *Nahom v. Blue Cross & Blue Shield of Arizona, Inc.*, 180 Ariz. 548, 552, 885 P.2d 1113, 1117 (1994). The plaintiffs are the intended beneficiaries of the subcontracts between the Districts and CAWCD, because the subcontracts were created to provide means for distribution of CAP water to agricultural landowners, a class in which the plaintiffs fit. "Irrigation districts are organized for the direct private benefit of their landowners and taxpayers. As such, they [the landowners] are required to help pay for the irrigation system and are entitled to a proportionate share of the water for irrigation of their lands . . . . " *Post v. Wright*, 37 Ariz. 105, 117, 289 P. 979, 983 (1930). The court in *Estate of Jennifer A. Bell v. American Motorist Insurance Co.*, 181 Ariz. 124, 126, 888 P.2d 1311, 1313 (1995), determined that the plaintiffs' situations cannot be changed without their consent. The court in *Estate of Bell* looked to the Restatement (Second) of Contracts § 311 (1979) and ruled that two parties cannot modify the agreement at the expense of a third because the plaintiffs have materially changed their position and relied on the subcontracts. *Id.* The plaintiffs have materially changed their position by paying taxes

toward CAP's expenses as well as giving up their grandfathered water usage rights. Therefore, the plaintiffs are entitled to a declaration of rights under the subcontracts.

CONCLUSION

The rights vested in the plaintiffs run appurtenant to their land; therefore, the Districts have no authority to modify or create new contracts that will affect those rights without the plaintiffs' consent. The Court grants Summary Judgment in favor of the Plaintiffs.

Mailed/distributed copy: 11/17/2004

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IN THE SUPREME COURT OF
THE STATE OF ARIZONA

MARICOPA-STANFIELD IRRIGATION & DRAINAGE DISTRICT, an Arizona municipal corporation; CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICT, an Arizona municipal corporation; and approximately two hundred landowners, Petitioners, v. THE HONORABLE KELLY MARIE ROBERTSON, Judge of the Pinal County Superior Court, Respondent, and JOHN E. SMITH, et al., Respondents-Real Parties in Interest.	No. Pinal County Superior Court No. CV 2001-00924

PETITION FOR SPECIAL ACTION

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JURISDICTIONAL STATEMENT

This is a petition for special action arising out of a grant by the Pinal County Superior Court of a motion for partial summary judgment in a civil action. This Court has jurisdiction over this matter pursuant to Article 6, § 5(4) of the Arizona Constitution. The decision of Respondent Judge Robertson would enjoin two irrigation districts from relinquishing Central Arizona Project ("CAP") subcontract water without the consent of every landowner.[1] Unless the decision is overturned, it will not be possible to implement the important and historic water settlements embodied in the Arizona Water Settlements Act. That Act was passed by Congress on November 17, 2004, and signed by the President on December 10, 2004. [App. 1.]

The Arizona Water Settlements Act

The benefits to Arizona of these settlements include, among others:

[1] The two irrigation districts directly at issue in this special action are Petitioners Maricopa-Stanfield Irrigation & Drainage District ("MSIDD") and the Central Arizona Irrigation and Drainage District ("CAIDD"). MSIDD and CAIDD are referred to herein collectively as "the Districts."

- Settlement of claims of the Gila River Indian Community filed in the Gila Adjudication to more than two million acre-feet of water that have for more than twenty years been a cloud on the water rights of users in and residents of the Salt and Gila River valleys and on the groundwater use rights of the Districts [App. 1, Title II];[2]
- Settlement of claims of the Tohono O'odham Nation filed in 1976 in federal court, which sought to enjoin the pumping of groundwater in the entire Tucson area [App. 1, Title III];
- Settlement of a long-standing dispute over Arizona's obligation to repay costs of the construction of the CAP and a reduction of Arizona's obligations by $650 million [App. 1, Title I];
- Allocation to CAP Municipal and Industrial subcontractors of an additional 65,000 acre-feet of CAP water and extension of the term of their subcontracts from 50 years to 100 years [App. I, Title I];
- Decrease in the cost of CAP water for farmers in the Districts from $76 per acre-foot to $28 per acre-foot for a cumulative thirty-year benefit of over $80 million for each District [App. 14, ¶ 28];
- Forgiveness of approximately $130 million of District debt to the United States, and relief to the farmers from restrictive limitations on CAP water

[2] *See In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, Maricopa County Superior Court, Nos. W-1 through W-4 ("Gila Adjudication"). An acre-foot equals 325,851 gallons of water. The two million acre-feet claimed by the Gila River Indian Community is more than the entire normal flow of the Gila and Salt Rivers. [App. 53]

use under various federal statutes. [App. 14, ¶ 29; App. 2, Exhibit 7.2]

The settlement package embodied in the Arizona Water Settlements Act will be referred to herein as "the Settlement." The Settlement has been characterized by Senator John McCain as being "of vital importance to Arizona's productive future." [App. 4, at 1.] Senator Jon Kyl has stated that the Settlement "could ultimately be nearly as important to Arizona's future as was the authorization of the Central Arizona Project itself." [App. 5, at A18.] *See also* App. 6-8.

The Importance of Agricultural CAP Water to the Settlement

The cornerstone of the Settlement is the voluntary relinquishment by agricultural CAP subcontractors of subcontract allocations of CAP water that will be used by the United States to settle Indian water claims. Since completion of the CAP in 1993, none of the irrigation districts with CAP subcontracts has been able to purchase Agricultural subcontract water because it was prohibitively expensive. [App. 14, ¶¶ 16-18.]

The CAP is administered by a three-county entity known as the Central Arizona Water Conservation District ("CAWCD"). *See* A.R.S. §§ 48-3701 to -3783. CAWCD responded to the irrigation districts' inability to afford water at the subcontract rate by making excess CAP water available to the districts at affordable prices for ten years. [App. 14, ¶¶ 19-21.] In 2002, in order to obtain CAP water for the Secretary of the Interior ("Secretary") to implement the Settlement, CAWCD offered a package of benefits to each district in exchange for relinquishment of its subcontract water rights. [App. 14,

¶¶ 24-30.] Both of the Districts held elections to determine whether landowners favored relinquishing the Districts' rights to subcontract water in return for the various benefits that were offered. A majority of votes in both Districts favored the proposed relinquishment. [App. 14, ¶ 32; App. 17, ¶ 5.]

This CAWCD proposal and the program for implementation of the Settlement are contained in the Arizona Water Settlement Agreement ("Settlement Agreement")[3] among CAWCD, the Arizona Department of Water Resources, and the United States, acting through the Secretary. [App. 2.] The Arizona Water Settlements Act authorized and directed the Secretary to execute the Settlement Agreement on behalf of the United States. The Settlement Agreement provides for the Secretary to use 197,500 acre-feet of Agricultural Subcontract water for reallocation to the Gila River Indian Community, the Tohono O'odham Nation, and other Indian tribes in settlement of pending water rights claims. [App. 1, § 104(a)(1)(A); App. 2, ¶¶9.2, 13.2.] If Agricultural subcontractors do not relinquish sufficient CAP water to enable the Secretary to make such reallocations, the Settlement Agreement and all of the settlements embodied in the Arizona Water Settlements Act will fail. [App. 1, 2.]

The Civil Action in the Trial Court

The civil action which is the subject of this petition was filed in 2001 in the Final, County Superior Court by some dissident landowners (collectively, "Plaintiffs").

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[3] The Arizona Water Settlement Agreement is defined in § 2(32) of the Arizona Water Settlements Act as the "Master Agreement."

Plaintiffs sought to prevent the Districts from relinquishing any of the CAP Subcontract water in which Plaintiffs claimed appurtenant ownership interests. [App. 10.] Of the 293,795 acre-feet of Agricultural CAP water potentially available to the Secretary for the Settlement, up to 180,000 acre-feet were to be relinquished by the Districts. [App. 2, ¶5.1.4.] If the two Districts are not able to relinquish this water, the Secretary will not receive the 197,500 acre-feet required to implement the settlement. [*Id.*]

In December, 2003, Plaintiffs moved for partial summary judgment. [App. 11.] The Districts and defendant landowners filed cross-motions for summary judgment. [App. 13, 15, 16.] After extensive briefing, the court heard argument on August 6, 2004. [App. 11-48.] On November 16, 2004, the trial court issued its minute entry ruling granting summary judgment to Plaintiffs. A copy of that minute entry is attached to this Petition as Exhibit A. The court held that the rights to Colorado River water under the CAP subcontracts are appurtenant to Plaintiffs' land and that rights under each of the CAP Subcontracts are contractually vested in the landowners and enforceable by them. The trial court also held that the landowners are intended third-party beneficiaries of the CAP subcontracts and that a District cannot modify the subcontract in any way that will affect a landowner's appurtenant rights without that landowner's consent.

This Petition for Special Action

Petitioners seek a special action in the Supreme Court of Arizona because the trial court's ruling is an urgent matter of state-wide importance and great public interest. There are no factual issues; an appeal would not provide

an adequate remedy; the trial court's ruling contradicts a ruling by the United States District Court for the District of Arizona in a case involving the same Subcontracts and some of the same parties; and final resolution in a prompt manner is required.

If the lower court's decision is not overturned soon, Arizona and CAWCD will not be able to implement and complete the Settlement before the time limits set in the Act. *See* Section I of the Argument, *infra*.

Petitioners seek relief in this Court rather than the Court of Appeals because of the urgent need for speedy and final resolution of this matter of state-wide importance. Petitioners recognize that the acceptance of special action jurisdiction is highly discretionary. In a number of cases involving matters of state-wide significance where an appeal would not provide adequate or speedy relief, this Court has accepted jurisdiction.

In *Bledsoe v. Goodfarb,* 170 Ariz. 256, 823 P.2d 1264 (1991), *appeal after remand,* 179 Ariz. 469, 880 P.2d 689 (1994), *review denied* (Sept. 20, 1994), this Court accepted special action jurisdiction to review a grant of partial summary judgment that concerned the doctrine protecting owners and operators of irrigation canals from liability because it raised issues of state-wide significance. The issues raised in the present case concerning the historic settlements embodied in the Act are at least as important as the protection of owners and operators of irrigation canals from liability.

In accepting special action jurisdiction in *Western Water Service Sys. v. Superior Court,* 120 Ariz. 90, 91, 584 P.2d 554, 555 (1978), to review a superior court grant of

partial summary judgment that declared a statutory triple damage provision unconstitutional, this Court stated:

> This Court has the power to issue writs of review pursuant to the Constitution, Article 6, § 5, subsec. 4. It will accept jurisdiction and grant relief by way of special action if the issues raised are of sufficient importance to justify the review requested. . . . Jurisdiction was accepted here because we concluded that the trial court's granting of a motion for partial summary judgment is without precedent or support in the law and cannot be justified.

Here, the trial court's granting of the motion for partial summary judgment was without precedent or support in law and cannot be justified. In addition, if the ruling is not promptly overturned, water settlements of historic importance to the State of Arizona will fail.

This Court, rather than the Court of Appeals, is the appropriate forum for the resolution of the issues raised by this Petition. The decision of Respondent Judge Robertson would enjoin the Districts from relinquishing their CAP subcontracts without the consent of every landowner in each District. A decision by Division Two of the Court of Appeals in a special action challenging Judge Robertson's ruling, although of precedential value, might not have binding effect in Division One. Many of the other irrigation districts that have already relinquished their CAP subcontracts as part of the Settlement are in Maricopa County, to-wit: Chandler Heights Citrus Irrigation District, Queen Creek Irrigation District, San Tan Irrigation District, and Tonopah Irrigation District [App. 2, ¶ 5.1.4.] Having learned of Judge Robertson's ruling in this litigation, a landowner in any of these districts could assert in

the Maricopa County Superior Court the same claims made by Plaintiffs here. On review of the decision in that case, Division One of the Court of Appeals would not be bound by the decision of Division Two.

Furthermore, this Court has previously recognized the need for direct interlocutory review to this Court in important water matters. In 1989, this Court adopted a Special Procedural Order for Interlocutory Appeals and Certifications from the Gila Adjudication. [App. 51.] In that order, the Court noted that "[e]arly appellate review may avoid wasteful trial court proceedings, may result in substantial savings of time or expense, or may for other reasons be in the interests of justice." *Id.* at 7. In 1991, the Court adopted a subsequent Special Procedural Order for Approval of Federal Water Rights Settlements, Including Those of Indian Tribes. [App. 52.] That order provides that decisions on approval of Indian water rights settlements are subject to immediate interlocutory review by this Court. *Id.* § D(7), at 8. Although those orders are not strictly applicable to this Petition because it does not arise directly from the Gila Adjudication, the considerations supporting those orders weigh heavily in favor of this Court accepting this Petition, particularly in light of the fact that the trial court ruling at issue in this Petition effectively obliterates water rights settlements for two major Indian tribes that took decades to achieve.

The Arizona Legislature has also recognized the importance of finality in matters involving CAP contracts. A.R.S. § 48-3734 provides that review of an action to validate a CAP contract shall be by special action directly to this Court. In essence, Plaintiffs' lawsuit was a preemption of the contract validation process established in A.R.S. § 48-3731 *et seq.* With the completion and

implementation of the Settlement at stake, it is of the utmost importance that the issues raised in this Petition be resolved speedily and finally.

STATEMENT OF THE ISSUES

The central issue in this case is whether irrigation districts must obtain the express individual consent of each landowner in the district to modify agreements that specify the terms by which the districts receive water from the Central Arizona Project. The resolution of that issue turns on two subsidiary issues: (1) whether individual landowners are intended third-party beneficiaries of the Subcontracts pursuant to which irrigation districts receive water from the Central Arizona Project; and (2) whether, by virtue of applicable water law, individual landowners have acquired vested rights, appurtenant to the land, to receive water pursuant to those Subcontracts.

SUMMARY OF ARGUMENT

The trial court rendered summary judgment that individual landowners within the Districts have legal and contractual rights to receive water from the CAP under a CAP Agricultural subcontract. The trial court ruled that the Districts cannot, without the express individual consent of each landowner, modify the terms of the subcontracts pursuant to which the Districts are entitled to receive CAP water.

The trial court's ruling that each landowner is an intended third-party beneficiary of subcontracts among the Districts, the Secretary, and CAWCD was barred by collateral estoppel and the absence of indispensable

parties. That ruling is also demonstrably incorrect as a matter of law. The trial court's ruling that the right to CAP water is vested in the landowners by operation of law rests on a fundamental misunderstanding as to the law that has governed the allocation of water from the Lower Colorado River for decades.

STATEMENT OF FACTS

The Parties

Two of the Petitioners in this matter, MSIDD and CAIDD, are irrigation districts in Pinal County. The remaining Petitioners consist of approximately two hundred landowners ("Landowners") within those Districts who were parties defendant in the trial court proceedings. The Landowners supported the positions taken by the Districts in the trial court. The Landowners are more specifically identified in Exhibit B.

The Respondents-Real Parties in Interest consist of landowners within the Districts who were plaintiffs in the trial court ("Plaintiffs").[4] The Respondents-Real Parties in Interest are more specifically identified in Exhibit C.

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[4] Soon after oral argument on the motions, each of the Plaintiffs with CAP-eligible land within CAIDD sold its land. [App. 49.E.] Thus, as of this time, there are no Plaintiffs who own land within CAIDD that is eligible to receive CAP irrigation water, regardless of the outcome of this dispute. In MSIDD, a number of the Plaintiffs have also sold their land but some Plaintiffs from that District still have standing to assert the claims that have been raised in this matter. [App. 50.]

Background

In 1972, CAWCD and the Secretary entered into a Master Repayment Contract for the delivery of Colorado River water through the CAP and for the repayment of the allocable costs of the Project. [App. 9, Exhibits 1, 2.] In 1983, pursuant to the Master Repayment Contract, the Districts each entered into a long-term subcontract regarding CAP water with the Secretary and CAWCD. [App. 9, Exhibits 3, 4.] The agreements that allocate the water to the Districts and that govern the terms of its purchase are generally referred to as the Subcontracts. The landowners within the Districts were not parties to the Subcontracts.

The central fact about the Subcontracts, which have a term until 2043, is that the farmers in the Districts have never been able to afford to buy water at the price set by those agreements. In 1994, CAP infrastructure and water costs caused CAIDD to file for municipal bankruptcy protection. [App. 14, ¶ 18.] Because Subcontract water has never been affordable, neither District has ever received a drop of CAP water pursuant to its Subcontract. [App. 14, ¶ 28; App. 29, at 2.]

The Subcontracts contain a formula for determining the price that the Districts must pay for CAP water delivered under the Subcontracts. [App. 9, Exhibits 3, 4.] In 1993, when construction of the CAP was completed, the Districts advised CAWCD that they could not afford to pay the price dictated by the contractual formula for the water. [App. 14, ¶¶ 16-18.] The Districts and CAWCD dealt with the problem by entering into ten-year letter agreements that allowed the Districts to purchase "excess" water at affordable rates. [App. 14, ¶¶ 19-23.] Those agreements have now expired.

The Settlement Agreement provides the opportunity for the Districts to relinquish the Subcontract rights that they have never been able to afford to exercise in return for substantial benefits. The Settlement Agreement contemplates that the United States will acquire the agricultural Subcontract allocation that MSIDD, CAIDD, and other irrigation districts have agreed to relinquish. [App. 2, ¶ 9.2.] The first 197,500 acre-feet of water available for reallocation will be reallocated as follows:

- 102,000 acre-feet to the Gila River Indian Community
- 28,200 acre-feet to the Tohono O'odham Nation
- 67,300 acre-feet to be retained by the Secretary to be reallocated in future Arizona Indian water settlements.

[*Id.*] The remaining 96,295 acre-feet of relinquished water will be allocated to the Arizona Department of Water Resources in trust for future reallocation to Arizona non-Indian municipal and industrial water users.

In return for agreeing to relinquish their Subcontract rights, the Districts would obtain a number of significant concessions and benefits, MSIDD would be relieved from approximately $70 million in debt related to the construction of its facilities. [App. 2, Exhibit 7.2.] CAIDD would be relieved from approximately $60 million of similar debt. [*Id.*; App. 14, ¶ 29.] Both Districts would enter into new agreements with CAWCD that would enable them to purchase low-cost excess CAP water until 2030. [App. 14, ¶ 27.] The present value of this reduction in the cost of CAP water is approximately $80 million for each District. Potential and pending claims against the Districts by Indian tribes for groundwater depletion would be resolved. [App. 14,

¶ 30.] The Districts would also be relieved of obligations under the Reclamation Reform Act. [App. 14, ¶ 30.]

The Subcontract rights that the Districts have agreed to relinquish are essential to the Settlement. The Settlement Agreement provides that the United States may terminate the Settlement if the water available for reallocation is less than 197,500 acre-feet. [App. 2, ¶ 13.2.] If the trial court's order stands and MSIDD and CAIDD cannot relinquish their allocations, the water available for reallocation will constitute less than the required 197,500 acre-feet. [App. 2, at table 5.1.4; *id.*, subparagraph 5.2.3.]

As they did in entering into the Subcontracts in 1983, both Districts held landowner elections regarding the proposed relinquishment of Agricultural CAP Subcontract allocations pursuant to A.R.S. §§ 48-2977 and -2978. [App. 14, ¶ 32; App. 17, ¶ 5.] The vote in both Districts showed that the owners of a majority of the land voting favored the relinquishment. [App. 14, ¶ 32; App. 17, ¶ 5.] The elected board of each District approved the proposed relinquishment agreements. [App. 14, ¶ 35; App. 17, ¶ 7.] This lawsuit had already been filed. The relinquishment agreements signed by both Districts were conditioned on the final outcome of this case. [App. 14, ¶ 26; App. 17, ¶ 7.]

A few landowners in each District opposed the Settlement. With the consent of the Secretary and CAWCD, both Districts gave landowners the option of acquiring by assignment an individual right to purchase water according to the terms of the Subcontracts. [App. 29, at 2.] This option required the assignee landowner to pay the full Subcontract price for the assigned Subcontract water. [*Id.*] Only one of the Plaintiffs in CAIDD made a request for such an assignment. That request was untimely. [*Id.*] Only

two landowners in MSIDD, neither of which is a Plaintiff, chose to accept the offer of an assignment. [*Id.*] To date, no Subcontract has as yet been executed by either putative assignee.

The Legal Proceedings

Approximately 41 of the dissident landowners brought the legal action in 2001 in Pinal County Superior Court. [App. 10.] Plaintiffs requested special-action and declaratory relief to prohibit the Districts from relinquishing the Districts' Subcontract rights. [*Id.*]. They argued that the proposed relinquishment of rights under the Subcontracts would infringe on their individual water rights. [*Id.*]

This case was initially stayed because of uncertainty as to whether the Gila River Indian Community water settlement would go forward. [App. 55.] The stay was lifted in early 2003. [App. 56.] At that time, the trial court ruled that the landowners within the Districts were indispensable parties to this action and ordered them joined. [App. 56.] Most were. The majority of the landowners who were joined took no active role in the action. About two hundred twenty landowners, most of whom are Petitioners here, took an active role, opposing the claims by Plaintiffs and supporting the position of the Districts. [App. 15, 26, 33, 35.]

Subsequently in March 2003, Plaintiffs sued CAWCD in state court. CAWCD removed the action to federal district court. [App. 29, Exhibit 1.] As in their case against the Districts, Plaintiffs alleged in the federal case that the proposed relinquishment of rights under the Subcontracts by the Districts would infringe on rights to that water which they enjoyed individually. [*Id.*] In November 2003,

Judge Earl Carroll dismissed Plaintiffs' action for failure to state a claim upon which relief could be granted. [*Id.*] Judge Carroll held that, because Plaintiffs were not parties to the Subcontracts and were not intended third-party beneficiaries of those agreements, they could not obtain relief against CAWCD concerning the proposed modification of the Subcontracts. [*Id.* at 4, 9-10.]

In late 2003, Plaintiffs filed a motion for partial summary judgment in the present case. [App. 11.] Shortly thereafter, the Districts and Landowners filed cross-motions for summary judgment. [App. 13, 15, 16.] After extensive briefing and oral argument, Judge Robertson granted Plaintiffs summary judgment on November 16, 2004. [Ex. A.] Judge Robertson held, contrary to long-established law relating to the Colorado River, that Plaintiffs had acquired vested rights to Subcontract water by operation of law. [*Id.*] In addition, contrary to what Judge Carroll had ruled, the trial court held that Plaintiffs were intended third-party beneficiaries of the Subcontracts and that their consent was required before those agreements could be modified. [*Id.*]

ARGUMENT

I. THIS COURT SHOULD ACCEPT JURISDICTION OF THIS SPECIAL ACTION – PETITIONERS DO NOT HAVE AN ADEQUATE REMEDY BY APPEAL.

This case involves issues of law that are of state-wide importance. The importance of these issues was fully explained in the Jurisdictional Statement and will not be repeated here. The inadequacy of the remedy by appeal

was not explained in the Jurisdictional Statement and is the subject of this portion of the Argument.

There is a serious risk that an appeal would not provide relief from the trial court's ruling in time to salvage the Settlement. The stakes are too high for that risk to be taken.

Petitioners cannot appeal until there is a final judgment in the trial court. That may be two to three months away. An appeal to Division Two of the Court of Appeals might consume an additional twelve to eighteen months. A petition for review by either party might mean that the appeal from the trial court's order would not be completed for over two and a half years.

At that point, this case might or might not be over. Both sides to this dispute appear to believe that this case is suitable for resolution by summary judgment. If an appellate court were to disagree and decide that a trial as to some issue is necessary, a complete resolution might be years away.

The Arizona Water Settlements Act establishes a firm deadline of December 31, 2007, for satisfaction of a number of prerequisites to implementation of the Settlement. [App. 1, § 207(c)(2).] If that deadline is not met, federal authorization for the Settlement will expire. The allotted time might appear to be ample. It will not be if the necessary steps are delayed by the appeal of this case. The prerequisites to completion of the Settlement are numerous, complicated, interrelated and fragile.

(1) The Arizona Legislature must pass legislation to establish certain programs for protecting groundwater under the Gila River Indian Reservation and under the

Tohono O'odham Reservation. [App. 1, § 207(c)(1)(I).] The Legislature must also enact legislation to implement a groundwater protection program in the Upper Gila River basin. [*Id.*]

The Legislature has many demands on its attention. It must establish priorities. The trial court in this case has declared that a necessary component of the Settlement – i.e., the relinquishment of the Districts' CAP Subcontracts – is illegal. As long as the cloud of the lower court's ruling remains, it could be difficult to get the Legislature to enact legislation to implement a settlement that a Pinal County Superior Court Judge has pronounced dead.

(2) After the Legislature passes the required legislation, whenever that might be, the final dismissal of several court cases pending in federal district court in Tucson must be ordered. [App. 1, § 302(b).] Those eases cannot be dismissed until notification to class members has been provided. The federal court in Tucson cannot proceed with class notification of the proposed dismissal of those actions while the trial court's ruling stands and the viability of the Settlement remains in question.

(3) The settlement of claims by the Gila River Indian Community and the Tohono O'odham Nation must be submitted to the Gila Adjudication Court and approved. [App. 1, § 207(c)(1)(G).] It is estimated that it may take as much as a year to obtain approval after the applications are filed. Unforeseen complications or disputes could delay the completion of that step even further. If application for approval of the settlements was made while the trial court's ruling remains in effect, the existence of that ruling would become an issue in the Adjudication proceeding and

inhibit the Adjudication Court's review of the two Indian water claims settlements.

(4) Each District must initiate and complete validation proceedings in Pinal County Superior Court, in which all interested parties will have an opportunity to challenge the legality of the agreements to relinquish water. *See generally* A.R.S. §§ 48-3731 to 48-3734. As long as Judge Robertson's ruling stands, such proceedings cannot be meaningfully conducted. Plaintiffs would presumably contend that the illegality of the proposed agreements is *res judicata* by virtue of Judge Robertson's ruling. The Districts therefore would not be able to address any other legal objections that interested parties might have until the issues raised in this case are resolved. In addition, pursuant to section 29.5.2 of the Gila River Indian Community's Water Rights Settlement Agreement, this specific case must be resolved in the Districts' favor before their obligations under the Settlement are enforceable. [App. 3, § 29.5.2.]

An appeal might result in a final ruling in 2006, 2007 or even later. That ruling might or might not fully resolve the controversy. Several complicated steps must be taken between the time this controversy is fully resolved and the end of 2007. Arizona cannot afford to run the risk that the Settlement will fail because of court delays.

An appeal would not provide the timely relief required here. Petitioners have no "equally plain, speedy and adequate remedy by appeal." ARPSA 1. *City of Phoenix v. Superior Court (Kleven Constr.)*, 184 Ariz. 435, 436, 909 P.2d 502, 503 (App. 1995), *corrected* (1996); *Green v. Superior Court,* 132 Ariz. 468, 470, 647 P.2d 166, 168 (1982).

II. THE TRIAL COURT ERRED IN RULING THAT THE PLAINTIFF LANDOWNERS WERE INTENDED BENEFICIARIES OF THE SUBCONTRACTS.

The trial court concluded on the basis of Arizona law that Plaintiffs were intended third-party beneficiaries of the Subcontracts. [Ex. A at 4.] The trial court further held that, because Plaintiffs were third-party beneficiaries, the Districts could not modify the Subcontracts without Plaintiffs' consent. [*Id.*] This decision was erroneous.

A. The Trial Court Should Not Have Reached the Merits of Plaintiffs' Third-Party Beneficiary Claim

For two reasons, the trial court should not have reached the merits of the third-party beneficiary issue. One reason is that Plaintiffs were collaterally estopped from making that argument. The second reason is that all of the parties to the Subcontracts were indispensable with regard to that claim. Two of the parties to the Subcontracts had not been joined.

1. Plaintiffs Are Collaterally Estopped From Making a Third-Party Beneficiary Claim.

Plaintiffs had previously sued CAWCD over the same issues that Plaintiffs raised in this case. Judge Carroll of the United States District Court held in September 2003 that Plaintiffs were not third-party beneficiaries of the Subcontracts and dismissed their complaint. [App. 29, Exhibit 1.]

Collateral estoppel or issue preclusion is applicable when (1) the issue or fact to be litigated was actually litigated in a previous suit; (2) final judgment was entered;

(3) the party against whom the doctrine is to be invoked had a full opportunity to litigate the matter and actually did litigate it; and (4) the resolution of the issue was essential to the prior judgment. *State ex rel. Dept. of Economic Sec. v. Powers*, 184 Ariz. 235, 237, 908 P.2d 49, 51 (App. 1995). Judge Carroll's opinion itself establishes that all of these requirements were satisfied in this instance. [App. 29, Exhibit 1.]

Plaintiffs contended that collateral estoppel did not apply because they were appealing Judge Carroll's decision to the Ninth Circuit. The pendency of Plaintiffs' appeal, however, did not suspend the collateral estoppel effect of Judge Carroll's ruling. Federal law controls when the preclusive effects of a federal judgment are asserted in a state proceeding. *See* C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4433, at 310 (1981). Under federal law, the pendency of an appeal does not suspend the issue-preclusion effect of a judgment. *Robi v. Five Platters, Inc.*, 838 F.2d 318, 327 (9th Cir. 1988); *Hawkins v. Risley*, 984 F.2d 321, 324 (9th Cir. 1993).

Although the issue of collateral estoppel was briefed and argued, the trial court made no mention of it when issuing a ruling that was directly at odds with the prior ruling of the federal district court. [Ex. A at 4.]

2. Indispensable Parties Were Not Joined in the Trial Court.

All of the parties to the Subcontract were indispensable parties with regard to Plaintiffs' third-party beneficiary claim. Two of the three parties to each Subcontract – i.e., the United States and CAWCD – were not joined in the trial court.

A motion that raised this defect in parties was pending when the trial court granted summary judgment. That motion has still not been formally decided by the trial court. The court's decision to rule on the merits without addressing the defect in parties, however, constituted an implicit denial of the motion. The fact that there has been no formal ruling on this issue by the trial court does not preclude this Court from addressing the issue. The absence of indispensable parties may be raised for the first time on appeal. *Siler v. Superior Court*, 83 Ariz. 49, 54, 316 P.2d 296, 300 (1957).

Third-party beneficiary rights are contract rights. *See* 9 Corbin on Contracts § 779J (Interim ed. 2002). The trial court's conclusion that Plaintiffs are intended beneficiaries of the Subcontracts means that individual landowners can enforce the Subcontracts directly against the United States and CAWCD. *See* Restatement (Second) of Contracts § 304. It means that individual landowners can veto changes to the Subcontracts under certain circumstances. *Id.* § 311, comment g. By allowing a non-party to the Subcontract to prohibit contract modifications, the trial court effectively impeded the ability of all three contracting parties to modify their agreement by consent. The trial court's ruling therefore impaired the interests of the absentees. *See* Ariz. R. Civ. P. 19(a).

Because the trial court rendered a ruling that was contrary to the prior federal court ruling, the parties to the Subcontracts are now subject to inconsistent adjudications concerning the rights and obligations that arise under their agreements. That fact provides a separate basis for concluding that the United States and CAWCD are necessary parties. *Id.*

"[A] contracting party is the paradigm of an indispensable party." *Travelers Indemnity Co. v. Household Int'l, Inc.*, 775 F. Supp. 518, 527 (D. Conn. 1991). The trial court erred in deciding contractual rights and obligations when two of the three parties to the contracts at issue were not present to defend their interests.

B. Federal Law Establishes that Plaintiffs Are Not Intended Third-Party Beneficiaries.

Yet another problem with the trial court's ruling was that the trial court applied the wrong body of substantive law to the issue. The United States is a party to the Subcontracts. Federal law determines whether someone is a third-party beneficiary of a contract to which the United States is a party, *Klamath Water Users Protective Ass'n v. Patterson,* 204 F.3d 1206, 1210 (9th Cir. 1999), *cert. denied,* 531 U.S. 812 (2000); *see also Kennewick Irr. Dist. v. United States,* 880 F.2d 1018, 1032 (9th Cir. 1989) (federal law controls the interpretation of a contract entered into pursuant to federal law when United States is a party). The federal district court had properly applied federal law when it concluded that Plaintiffs were not intended beneficiaries of the Subcontracts. [App. 29, Exhibit 1.] The trial court, without addressing the choice-of-law issue, applied Arizona law to the third-party beneficiary analysis. [Ex. A at 4.]

Under the federal law that should have been applied, Plaintiffs were not third-party beneficiaries of the Subcontracts. Parties that benefit from a government contract are generally assumed to be incidental beneficiaries unless the contract evidences a clear intent to the contrary. *Klamath,* 204 F.3d at 1211 (holding that water users were not intended beneficiaries of a reclamation contract); *accord*

Orff v. United States, 358 F.3d 1137, 1145-47 (9th Cir.), *cert. granted,* 125 S. Ct. 309, 73 USLW 3228, 73 USLW 3235 (2004).[5]

The thirty-six-page Subcontracts between the Districts, the United States, and CAIDD are almost entirely silent about the landowners. Nothing in the Subcontracts expressly or implicitly indicates that the landowners within the Districts were to have intended-beneficiary status.

Plaintiffs argued that section 4.3(i) of the Subcontract, commonly known as the "conversion" provision, shows that landowners were intended to have enforceable rights. [App. 11; App. 20; App. 29, at 19-21; App. 47.] Agricultural CAP water is cheaper than municipal and industrial water and, by law, agricultural water can only be provided to eligible users. [*See* App. 9, Exhibit 3, § 4.3(i); App. 9, Exhibit 4, § 4.3(i).] Section 4.3(i) provides that if the use of particular land were to change from agricultural to municipal and industrial (e.g., subdivisions), that land would remain eligible to receive CAP water but a new agreement, with higher water rates and involving other parties, would be required. The conversion provision ensured that ineligible lands would not receive agricultural water and that

[5] Certiorari was granted in *Orff* to resolve an apparent conflict between *Orff* and the decision in *H. F. Allen Orchards v. United States,* 749 F.2d 1571 (Fed. Cir. 1984), *cert. denied,* 474 U.S. 818 (1985), which held that certain landowners were third-party beneficiaries of a water contract. *H. F. Allen* is distinguishable from the present case because it was agreed in *H.F. Allen* that the landowners owned the water rights governed by the contract. In any event, the test used in *Orff* to determine third-party beneficiary status accords with the Restatement view, as discussed hereafter, and it is unlikely that the Supreme Court will articulate a materially different test.

the Districts would not pay low agricultural rates to serve what were in fact municipal and industrial water users.

Section 4.3(i) never mentions landowners. The landowner is given no role in the conversion of water from agricultural to municipal and industrial purposes. The fact that landowners could, as a practical matter, trigger certain consequences under the Subcontracts by retiring their land from fanning does not mean that they had rights under those agreements. The conversion provision does not come close to reflecting a "clear intent" to "grant [the landowners] enforceable rights" as required by federal law. *Klamath,* 204 F.3d at 1211.

C. Even if Arizona Law Applied to the Issue, Plaintiffs Would Not Be Intended Third-Party Beneficiaries.

Incorrectly applying Arizona law, the trial court based its third-party beneficiary holding on two premises. One was that "the subcontracts were created to provide means for distribution of CAP water to agricultural landowners, a class in which the plaintiffs fit." [Ex. A at 4.] Although the purposes of the various parties to the Subcontract were more varied and complex than such a statement indicates, the statement was substantially correct.

The trial court then cited a decision by this Court that observed that

> irrigation districts are organized for the direct private benefit of their landowners and taxpayers. As such, they are required to help pay for the irrigation system and are entitled to a proportionate share of the water for irrigation of their

> lands, as also any profits accruing from the operation of the system.

Post v. Wright, 37 Ariz. 105, 117, 289 P. 979, 983 (1930), *quoted in* Ex. A at 4. Based on the overall purpose of the Subcontracts and the language from *Post v. Wright,* the trial court concluded that Plaintiffs were intended beneficiaries and that the agreements could not be modified without their consent.

Neither *Post v. Wright* nor any other Arizona decision has established such an impractical test for third-party beneficiary status. The statement in *Post v. Wright that* landowners are entitled to a proportionate share of water speaks to the relationship between an irrigation district and its landowners. That case did not say or imply that each individual landowner in an irrigation district has the right to veto modifications of contracts between the irrigation district and third parties.

Petitioners are not aware of any Arizona decisions that address the test for determining whether someone is a third-party beneficiary of a government contract. *Cf. Basurto v. Utah Construction & Mining Co.*, 15 Ariz.App. 35, 485 P.2d 859, 863 (App. 1971) (identifying general test for third-party beneficiary status). The Restatement view is that, although government contracts often benefit the public, individual members of the public are treated as incidental beneficiaries unless a different intention is manifested. *Restatement (Second) of Contracts* § 313, comment a; *see also id.,* illustration B. Only when such a contract manifests a clear intent to grant individual citizens enforceable rights can a citizen claim to be an intended third-party beneficiary. *See Berberich v. United States*, 5 Cl. Ct. 652, 656 (1984), *aff'd,* 770 F.2d 179 (Fed.

Cir. 1985); *Coburn v. City of Dyersburg,* 774 S.W.2d 610, 612 (Tenn. App. 1989).

The trial court's contrary holding would apparently give rise to a rule that, whenever a contract with a public entity is ultimately for the sake of the public entity's constituents, those constituents are intended beneficiaries. That rule would make the citizenry intended beneficiaries of most governmental contracts. That would mean that each citizen could sue to enforce such contracts and that, at least in some cases, each citizen could block any proposed changes to such contracts. *See Restatement (Second) of Contracts* §§ 304 and 311, comment g. The patent unworkability of such a rule explains why no court appears ever to have adopted it, except for the trial court in this case.

D. Summary

In a case involving the very same Plaintiffs and the very same issues, a federal court had already held that Plaintiffs were not intended beneficiaries of the Subcontracts. The trial court nonetheless revisited and accepted an argument that Plaintiffs were collaterally estopped from making. The trial court ignored the absence of indispensable parties. It applied the wrong substantive law. It then reached the wrong result pursuant to a rationale which, if generally applied, would significantly impair governmental operations. If the trial court's ruling stands, the parties to the Subcontracts will be subject to flatly contradictory and irreconcilable adjudications concerning the rights and obligations created by those agreements. That ruling should not stand.

III. THE TRIAL COURT ERRED IN FINDING THAT RIGHTS TO WATER UNDER THE DISTRICTS' CAP SUBCONTRACTS WERE APPURTENANT TO PLAINTIFFS' LAND AND THAT PLAINTIFFS HAD INDIVIDUALIZED RIGHTS IN THOSE SUBCONTRACTS.

As an alternate basis for granting summary judgment, the trial court found that Plaintiffs had acquired individual rights to Subcontract water by operation of law. The trial court held that the Districts' CAP Subcontracts were appurtenant to the land within the Districts and that Plaintiffs therefore had individualized rights to a pro rata portion of the Subcontract rights. [Ex. A at 1-3.] For these reasons, the trial court concluded that the Districts could not modify the Subcontracts without each landowner's consent [*Id.*]

The trial court applied the wrong law to this issue and reached an entirely incorrect result. The state law that governs the acquisition of water rights in connection with many Reclamation projects does not apply to post-1928 rights in projects involving water from the Lower Colorado River, including the CAP. Federal law controls the acquisition of such rights. Such rights can be acquired only through a contract with the Secretary. Plaintiffs have no such contract, and they have no individual rights to the water.

A. Post-1928 Rights to Water from Reclamation Projects on the Lower Colorado River Can Only Be Acquired by Contract.

Many Reclamation projects in the United States are governed by rules that were established in the 1902 Federal Reclamation Act, 43 U.S.C. § 383. Section 8 of that

Act, upon which the trial court incorrectly relied in its ruling, provides that the Reclamation Act is not to be construed as affecting or interfering with state laws "relating to the control, appropriation, use, or distribution of water used in irrigation." 43 U.S.C. § 383, *cited in* Ex. A at 2. The acquisition of water rights in connection with many Reclamation projects is therefore governed by state law.

In 1928, however, Congress enacted legislation that provided a different rule for the Lower Colorado River. The Boulder Canyon Project Act of 1928 allocated rights to the Colorado River among the three Lower Basin states (California, Arizona, and Nevada). The same act gave the Secretary of the Interior exclusive control over allocating Lower Colorado River water among the individual states and among various entities within those states. Section 5 of the act made it clear that rights to water from Reclamation projects on the Colorado River could be acquired *only* pursuant to a contract with the Secretary:

> The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses. . . . *No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.*

43 U.S.C. § 617d (emphasis added)

The United States Supreme Court acknowledged that post-1928 rights to Lower Colorado River water could be acquired only by a contract with the Secretary in *Arizona v. California,* 373 U.S. 546 (1963). The Court discussed the

Secretary's broad authority to allocate Colorado River water between individual entities in the affected states by entering into water delivery contracts with those entities. The Court noted that Congress had intentionally maintained federal control over the allocation of such water:

> Having undertaken this beneficial project, Congress, in several provisions of the [1928] Act, made it clear that no one should use mainstream [Colorado River] waters save in strict compliance with the scheme set up by the Act. Section 5 authorized the Secretary [of the Interior] "under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river * * * as may be agreed upon, for irrigation and domestic uses * * * ." To emphasize that water could be obtained from the Secretary alone, § 5 further declared, "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

373 U.S. at 579-80.

The Court went on to state that, based upon Congress' express statement in the 1928 Act, contracts with the Secretary were the exclusive means to allocate post-1928 legal rights to the waters of the Lower Colorado River:

> These several provisions, even without legislative history, are persuasive that Congress intended the Secretary of the Interior, through his § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water. . . .

Id. at 580-81 (emphasis added). The Court also observed that if Congress had intended that the Secretary's power to allocate water contractually would be subject to state-law water rights, it would have said so. It did not.

> Significantly, no phrase or provision indicating that the Secretary's contract power was to be controlled by the law of prior appropriation was substituted either then or at any time before passage of the Act, and we are persuaded that had Congress intended so to fetter the Secretary's discretion, it would have done so in clear and unequivocal terms, as it did in recognizing "present perfected rights" [i.e., those rights acquired prior to passage of the 1928 Act] in § 6.

Id.

B. Section 8 of the 1902 Reclamation Act Does Not Apply to This Case.

The trial court's ruling in this case was expressly grounded on Section 8 of the 1902 Federal Reclamation Act, 43 U.S.C. § 383, which makes state law generally determinative of water rights in other Reclamation projects. [Ex. A at 2.] The court in *Arizona v. California,* however, held that Section 8 did not apply to post-1928 contracts with the Secretary for Lower Colorado River water:

> . . . [W]e hold that the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by these sections [e.g., Section 8 of the Reclamation Act] to follow state law. . . . While the States were generally free to exercise some jurisdiction over these waters before the Act was passed, this

> right was subject to the Federal Government's right to regulate and develop the river. . . . [W]here the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, *state law has no place.*

Id. at 586-88 (emphasis added).

In support of its conclusion, the trial court also cited *California v. United States*, 438 U.S. 645 (1987). [Ex. A at 3.] *California v. United States* did not involve Colorado River water or the distinct body of law that governs rights to water from that river. At issue were rights to the Stanislaus River under the Central Valley Project in California. 438 U.S. at 645. In that case, Section 8 of the 1902 Reclamation Act applied and the landowners were required to obtain an appropriative right under state law. *California v. United States* sheds no light on the acquisition of water rights under the distinct rules that apply to the Colorado River.

California v. United States arguably narrowed some of the other holdings in *Arizona v. California.* The court in *California v. United States* acknowledged, however, as to the allocation and use of Colorado River water, the specific provisions of Section 5 of the 1928 Act controlled over the general provisions in Section 8 of the 1902 Reclamation Act. *See* 438 U.S. at 674; *see also Bryant v. Yellen*, 447 U.S. 352, 370-71 & n.21, *reh'g denied*, 448 U.S. 911 (1980) (*California v. United States* did not question the description of the Secretary's powers under the 1928 Act); *Long v. Salt River Valley Water Users' Ass'n*, 820 F.2d 284, 287 n.4 (9th Cir. 1987) (same).

C. Plaintiffs Have No Individual Rights to Subcontract Water.

The Subcontracts give the Districts specified rights to CAP water. Plaintiffs are not parties to those agreements. They have no contracts with the Secretary. They therefore have no individual rights to CAP water. 43 U.S.C. § 617d.

Even if the trial court had been correct in applying state law to this issue, its ruling would still have been erroneous. Arizona law provides that water users can acquire rights to surface water only pursuant to the doctrine of prior appropriation. *See* A.R.S. § 45-151; *see also Clough v. Wing*, 2 Ariz. 371, 17 P. 453 (1888); *San Carlos Apache Tribe v. Superior Court,* 193 Ariz. 195, 972 P.2d 179 (1999). Plaintiffs have never appropriated or received any Subcontract water. [App. 14, ¶ 37.] No landowners in either District have. [*Id.*] Because Subcontract water was priced too high for farmers to use, the Districts have obtained all the CAP water they have received by short-term excess water contracts. Plaintiffs would therefore have no individual rights to Subcontract water *even if* state law were applicable.

D. Summary

Federal law determines how rights to CAP water are acquired. That law provides that such rights can be acquired only by contract with the Secretary Plaintiffs have no such contract, and they have no rights to CAP water.

CONCLUSION

Only prompt relief by this Court can ensure that the trial court's erroneous rulings do not derail a major water settlement. Petitioners request that this Court grant special action relief directing the superior court to (1) vacate the grant of summary judgment to Plaintiffs; and (2) enter summary judgment that Plaintiffs are not intended third-party beneficiaries of the Subcontracts among the United States, CAWCD and the Districts, and that Plaintiffs have not acquired individual rights to receive water pursuant to those Subcontracts under the law that governs the acquisition of rights to water from the Lower Colorado River. Petitioners also request an award of their attorneys' fees pursuant to A.R.S. § 12-341.01(A).

December 14, 2004.

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Arizona Water Settlement Agreement

This Agreement is among the **United States of America**, acting through the Secretary of the Interior **(Secretary)** and the United States Bureau of Reclamation, Lower Colorado Regional Office; and the **State of Arizona**, acting through the Arizona Department of Water Resources **(ADWR)**; and the **Central Arizona Water Conservation District (CAWCD)**, a political subdivision of the State of Arizona.

1. Recitals of Authority

1.1 The United States, acting through the Department of the Interior, is entering into this agreement pursuant to the Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof and supplementary thereto, including, but not limited to the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057), as amended, the Reclamation Project Act of August 4, 1939 (53 Stat. 1187), as amended, the Colorado River Basin Project Act of September 30, 1968 (82 Stat. 885), as amended, all collectively referred to as the "Federal Reclamation Laws."

1.2 The State of Arizona, acting through the Arizona Department of Water Resources, is entering into this agreement pursuant to Arizona Revised Statutes, Title 45, Ch. 1.

1.3 The Central Arizona Water Conservation District is entering into this agreement pursuant to Arizona Revised Statutes, Title 48, Ch. 22.

2. Definitions

2.1 "1983 ROD" shall mean the record of decision published March 24, 1983, 48 Fed. Reg. 12446.

2.2 "Act" shall mean the Arizona Water Settlements Act of 2002, introduced in the United States Senate as S.2992 on September 24, 2002.

2.3 "CAIDD" shall mean the Central Arizona Irrigation and Drainage District, a political subdivision of the State of Arizona.

2.4 "CAP" shall mean the Central Arizona Project, as authorized and constructed pursuant to the Colorado River Basin Project Act of 1968. For purposes of this Agreement, CAP shall have the same meaning as described in the CAWCD Repayment Stipulation.

2.5 "CAP Repayment Stipulation" shall mean the Stipulation Regarding a Stay of Litigation, Resolution of Issues During the Stay and for Ultimate Judgment Upon Satisfaction of Conditions, filed pursuant to the order entered on May 9, 2000 in *Central Arizona Water Conservation District v. United States, et al.* No. CIV-95-625-TUC-WDB (EHC), No. CIV-95-1720-PHX-EHC (Consolidated Action), United States District Court for the District of Arizona, and any amendment or revision thereof.

2.6 "Currently Uncontracted M&I Priority water" shall mean 65,647 acre-feet of CAP municipal and industrial priority water that was allocated in the 1983 ROD but for which a long-term contract has not been entered.

2.7 "GRIC Settlement Agreement" shall mean the Gila River Indian Community Water Rights Settlement Agreement as defined in the Act.

2.8 "HIDD" shall mean the Hohokam Irrigation and Drainage District, a political subdivision of the State of Arizona.

2.9 "Hohokam Agreement" shall mean the Agreement Among the United States, the Central Arizona Water Conservation District, the Hohokam Irrigation and Drainage District, and the Arizona Cities of Chandler, Mesa, Phoenix and Scottsdale, dated December 21, 1993.

2.10 "Hohokam 9(d) Debt" shall mean that portion of the debt to the United States incurred by HIDD under section 9(d) of the Reclamation Project Act of 1939 that is payable by HIDD under section 4.2.2 of the Hohokam Agreement.

2.11 "MSIDD" shall mean the Maricopa-Stanfield Irrigation & Drainage District, a political subdivision of the State of Arizona.

2.12 "NIA Priority water" shall mean CAP water having a non-Indian agricultural priority as described in subparagraph 8.16 of the GRIC Settlement Agreement.

3. Purpose of this Agreement

3.1 This agreement memorializes the parties' intended approach to settle all current CAP allocation issues between the United States and the State of Arizona by agreeing to make certain quantities of NIA priority water available to the Secretary for allocation to Indian communities, and certain quantities available to ADWR to be held in trust for future allocation by the Secretary to non-Indian users within Arizona in a manner consistent with the Act.

3.2 This agreement also requires a reallocation of the Currently Uncontracted M&I Priority Water, and an allocation of and contract for mainstream Colorado River water under the Boulder Canyon Project Act of 1928 to the Mohave County Water Authority in exchange for the voluntary relinquishment by Mohave County Water Authority of certain contractual rights to NIA Priority water.

4. Quantification of NIA Priority water available for Contract.

4.1 The parties agree that, for the purpose of entering into long term contacts and subcontracts for CAP water under the Colorado River Basin Project Act of 1968 and the CAP Stipulation, the quantity of CAP water available for long-term contract or subcontract, and the quantity of NIA priority water available for long term contracts and subcontracts shall be calculated as follows:

4.1.1 The normal year supply of Colorado River water available for CAP is deemed to be 1,490,000 acre-feet per year for purposes of long-term contracting. This supply includes the CAP Project Water delivered in accordance with the Ak-Chin Indian Community Water Rights Settlement Act of 1984, Pub. L. 98-530 (the "Ak-Chin Act"), and the Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. 100-512 (the "SRPMIC Act"). Nothing in this agreement shall preclude CAWCD from diverting more than 1,490,000 acre-feet of Colorado River water in any year, but such excess diversion shall

not be available for long-term contract or subcontract.

4.1.2 To determine the amount of CAP water available for long-term contract and subcontract, canal losses and other operational losses for the CAP system must be subtracted. For purposes of this agreement, such losses shall be deemed to be 75,000 acre-feet per year for a normal year supply.

4.1.3 The normal year supply of CAP water available for long-term contract or subcontract shall be 1,415,000 acre-feet (1,490,000 acre-feet diverted from the Colorado River less 75,000 acre-feet of system loss).

4.1.4 Of the 1,415,000 acre-feet available for long-term contract or subcontract, the Secretary allocated 309,828 acre-feet to Indian uses and 638,823 acre-feet to municipal and industrial ("M&I") uses in the 1983 ROD. That left 466,349 acre-feet available for use by non-Indian agriculture in a normal year (the "1983 NIA Supply").

4.1.5 The 1983 NIA Supply was subsequently reduced as follows:

4.1.5.1 Under the Ak-Chin Act, the Secretary acquired 50,000 acre-feet of Colorado River water from the Yuma-Mesa Division of the Gila Project. After deducting for CAP system losses (deemed to be 5%), this acquisition resulted in a decrease of 47,500 acre-feet in the amount of CAP water available for

use by non-Indian agriculture in a normal year.

4.1.5.2 Under the SRPMIC Act, the Secretary acquired 22,000 acre-feet of Colorado River water from the Wellton-Mohawk Irrigation District. After deducting for CAP system losses (deemed to be 5%), this acquisition resulted in a decrease of 20,900 acre-feet in the amount of CAP water available for use by non-Indian agriculture in a normal year.

4.1.5.3 Under the Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub. L. 101-628, the Secretary acquired the CAP entitlement of Harquahala Valley Irrigation District and was authorized to convert that water from CAP non-Indian agricultural priority to CAP Indian priority. This acquisition resulted in a decrease of 33,251 acre-feet in the amount of CAP water available for use by non-Indian agriculture in a normal year.

4.1.5.4 Under the SRPMIC Act, the Roosevelt Water Conservation District ("RWCD") assigned 5,000 acre-feet of its CAP entitlement to certain Arizona cities. That assignment resulted in a corresponding decrease in the amount of CAP water available for use by non-Indian agriculture in a normal year.

4.1.5.5 Under an August 7, 1992 agreement among RWCD, the Secretary and the Gila River Indian Community ("GRIC"), RWCD relinquished the remainder of its CAP entitlement for the use and benefit of GRIC. That relinquishment resulted in a decrease of 18,600 acre-feet in the amount of CAP water available for use by non-Indian agriculture in a normal year.

4.1.5.6 Under the Hohokam Agreement, the CAP entitlement of HIDD and certain additional non-Indian agricultural water was subcontracted to the cities of Chandler, Mesa, Phoenix and Scottsdale. That action resulted in a decrease of 47,303 acre-feet in the amount of CAP water available for use by non-Indian agriculture in a normal year.

4.1.6 As a result of the reductions in the non-Indian agricultural water supply described in subparagraph 4.1.5, the remaining amount of CAP water available for use by non-Indian agriculture in a normal year is 293,795 acre-feet.

4.2 The parties agree that the maximum amount of NIA Priority water that may be available for reallocation under this agreement is 293,795 acre-feet.

5. Water Available for Reallocation.

5.1 Voluntary Relinquishments.

5.1.1 By January 1, 2003, CAWCD shall distribute voluntary relinquishment agreements in the form attached as Exhibit 5.1.1 to this agreement to Maricopa-Stanfield Irrigation & Drainage District, Central Arizona Irrigation and Drainage District, Chandler Heights Citrus Irrigation District, Queen Creek Irrigation District, San Tan Irrigation District, Tonopah Irrigation District and New Magma Irrigation and Drainage District (collectively, the Agricultural subcontractors).

5.1.2 Each Agricultural subcontractor will be given until May 1, 2003, to execute a voluntary relinquishment agreement. This date may be extended by mutual agreement of the parties to this agreement.

5.1.3 The voluntary relinquishment agreements shall become effective upon satisfaction of all conditions contained therein.

5.1.4 For purposes of this agreement, the total amount of NIA Priority water that may be relinquished by each Agricultural subcontractor is deemed to be as shown in table 5.1.4.

Table 5.1.4

Agricultural subcontractor	**NIA Priority water** (acre-feet)
Maricopa-Stanfield Irrigation & Drainage District	89,861
Central Arizona Irrigation and Drainage District	89,821
Chandler Heights Citrus Irrigation District	1,185
Queen Creek Irrigation District	19,078
San Tan Irrigation District	3,041
Tonopah Irrigation District	7,821
New Magma Irrigation and Drainage District	11,415

5.1.5 If any Agricultural subcontractor retains a portion of its entitlement to NIA Priority water as provided in paragraph 6, then the amount deemed to be relinquished by that Agricultural subcontractor shall be reduced in proportion to the percentage of entitlement retained. For example, if Maricopa-Stanfield Irrigation & Drainage District retained 10 percent of its current entitlement, then it would be deemed to have relinquished 80,875 acre-feet (89,861 minus 8,986).

5.1.6 Any water relinquished under a voluntary relinquishment agreement shall be available for reallocation in accordance with paragraph 9.

5.1.7 If any Agricultural subcontractor has not executed a voluntary relinquishment agreement by January 1, 2004, then either the Secretary or CAWCD may initiate legal action to effect the relinquishment of the subcontractor's entitlement. Any water relinquished pursuant to such legal action shall be available for reallocation in accordance with paragraph 9.

5.2 Uncontracted NIA Priority Water.

5.2.1 The provisions of this subparagraph 5.2 shall become effective upon enactment of the Act.

5.2.2 The Secretary shall publish a notice in the Federal Register in substantially the same form as Exhibit 5.2.2 modifying and terminating the applicable provisions of the Record of Decision published in the Federal Register on February 5, 1992 (57 Fed. Reg. 4470). Such notice shall state that it is published pursuant to the Act and is therefore a revocable action under the applicable provisions of the Act.

5.2.3 Following publication of the notice pursuant to subparagraph 5.2.2, 71,573 acre-feet of NIA Priority water shall be available for reallocation in accordance with paragraph 9. Such water is in addition to water available for reallocation under subparagraph 5.1.6.

6. Retention of NIA Priority Water by Agricultural Subcontractors

6.1 Any Agricultural subcontractor with an existing water service subcontract for NIA Priority water may elect to retain a portion of its

current entitlement to NIA Priority water. Such election must be made at the time the Agicultural subcontractor executes a voluntary relinquishment agreement. Table 6.1 identifies those Agricultural subcontractors that have an existing water service subcontract for NIA Priority water and the current entitlement for each.

Table 6.1

Agricultural subcontractor	Current Entitlement (percentage of available agricultural water)
Maricopa-Stanfield Irrigation & Drainage District	20.48%
Central Arizona Irrigation and Drainage District	18.01%
Chandler Heights Citrus Irrigation District	0.28%
Queen Creek Irrigation District	4.83%
San Tan Irrigation District	0.77%
Tonopah Irrigation District	1.98%

6.2 The retained entitlement shall be for a portion of the Agricultural subcontractor's percentage share of the available CAP agricultural water supply. For example, if MSIDD retained 10 percent of its current entitlement, then it would be entitled to 2.048% of the available CAP agricultural water supply.

6.3 CAWCD will charge the Agricultural subcontractor the same rate for delivery of the retained NIA Priority water as it charges other long-term CAP subcontractors.

6.4 CAWCD will require the Agricultural subcontractor to take delivery of all retained NIA Priority water under its subcontract before it may receive any other CAP water, whether for direct or in lieu use.

6.5 The Secretary and CAWCD shall require the Agricultural subcontractor to pay to CAWCD a 9(d) debt service charge equal to the proportionate share of the 9(d) debt discharged in accordance with paragraph 7. For example, if MSIDD retained 10 percent of its current entitlement, then it would be responsible for paying CAWCD 10 percent of each of the 9(d) debt payments shown in Exhibit 7.2 for MSIDD.

6.6 The Secretary and CAWCD shall amend the CAP water service subcontract of any Agricultural subcontractor that retains a portion of its current entitlement to NIA Priority water. The amended subcontract shall: (i) reflect the change in percentage entitlement to NIA Priority water; (ii) require the subcontractor to pay 9(d) debt service charges to CAWCD; (iii) provide that CAP water may be used only within the subcontractor's service area, which is delineated on a map filed with CAWCD and approved by CAWCD and the Secretary; (iv) provide that failure to make any payment when due, including any 9(d) debt service charge, shall cause the subcontract to terminate; and (v) provide that upon termination the NIA Priority water entitlement under the subcontract, calculated in accordance with paragraph 5.1.5, shall immediately transfer to the ADWR Trust water contract described in paragraph 9.3. The form of amended subcontract shall be as in Exhibit 6.6 to this agreement.

6.7 An Agricultural subcontractor that retains a portion of its current entitlement to NIA Priority water may assign all or part of its amended subcontract to an individual landowner within the Agricultural subcontractor's service area for use on CAP eligible acres owned by the individual landowner. The form of assignment shall be as in Exhibit 6.7 to this agreement.

6.7.1 CAWCD and the Secretary shall approve any such assignment that conforms to this agreement.

6.7.2 Upon validation of the assignee's subcontract, the Agricultural subcontractor shall have no further rights or obligations as to the portion of its CAP entitlement assigned to the landowner.

7. Discharge and Assumption of Debt Due under § 9(d) of the Reclamation Project Act of 1939 (43 U.S.C. § 485h).

7.1. Except as provided in subparagraph 7.3, this paragraph 7 shall become effective upon satisfaction of all conditions in subparagraph 13.3.

7.2. Exhibit 7.2 lists those Agricultural subcontractors eligible to participate in voluntary relinquishment agreements that have incurred debt to the United States under section 9(d) of the Reclamation Project Act of 1939 and identifies for each subcontractor the 9(d) debt payments remaining after payment of all installments due through December 31, 2003. Exhibit 7.2 also identifies the Hohokam 9(d) Debt.

7.3. Any Agricultural subcontractor that executes a voluntary relinquishment agreement as

provided in subparagraph 5.1 shall be relieved of its 9(d) debt in accordance with this paragraph and subparagraph 6.5, effective upon satisfaction of all conditions in the voluntary relinquishment agreement.

7.4. HIDD shall be entitled to relief from the Hohokam 9(d) Debt in accordance with this paragraph.

7.5. The United States shall declare all installment payments shown on Exhibit 7.2 for HIDD and for each Agricultural subcontractor that has executed a voluntary relinquishment agreement as provided in subparagraph 5.1 to be non-reimbursable and non-returnable to the United States, until an aggregate total of $73,561,337.00 has been declared non-reimbursable. Discharge of payments under this subparagraph shall not accelerate any remaining payments and shall not affect any obligation the Agricultural subcontractor or its assignee(s) may have to pay 9(d) debt service charges to CAWCD under its subcontract as amended pursuant to subparagraph 6.5.

7.6. After $73,561,337.00 of 9(d) debt has been discharged under paragraph 7.5, CAWCD shall pay to the United States all remaining installment payments shown on Exhibit 7.2 for HIDD and for each Agricultural subcontractor that executed a voluntary relinquishment agreement as provided in subparagraph 5.1. The installments assumed by CAWCD shall be due and payable to the United States in the same year that they would have been due absent this agreement.

7.7. The Secretary shall amend the 9(d) debt repayment contracts of HIDD and each Agricultural subcontractor that has executed a voluntary relinquishment agreement as provided in subparagraph 5.1 to conform to this paragraph.

8. Interim Provisions

8.1. Subject to Congressional authorization, the Secretary shall extend on an annual basis the 9(d) debt repayment schedule for any Agricultural subcontractor that has executed a voluntary relinquishment agreement as provided in paragraph 5.1. The effect of each annual extension shall be to postpone the due date of all remaining installment payments by one year. Such extensions shall commence with payments due in calendar year 2004 and shall continue until all conditions in subparagraph 13.3 have been satisfied or until this agreement is terminated, whichever comes first. No penalties, interest or other liability shall accrue as a result of any such extension.

8.1.1. When all conditions in subparagraph 13.3 have been satisfied, 9(d) debt repayment shall be in accordance with paragraph 7.

8.1.2. If this agreement is terminated, then each Agricultural subcontractor shall be responsible for repayment to the United States of its 9(d) debt in accordance with its repayment contract as modified by the extension(s) provided under subparagraph 8.1. This subparagraph shall survive termination of this agreement.

8.2. Beginning in 2004 and continuing until all conditions in subparagraph 13.3 have been satisfied or until this agreement is terminated, whichever comes first, CAWCD shall provide excess CAP water to HIDD and to any Agricultural subcontractor that has executed a voluntary relinquishment agreement as provided in paragraph 5.1 in accordance with the agricultural pool and pricing policy for 2004 to 2030 adopted by the CAWCD Board of Directors and the excess water contract attached as Exhibit 8.2 to this agreement.

8.2.1. When all conditions in subparagraph 13.3 have been satisfied, CAWCD shall provide water in accordance with the voluntary relinquishment agreement and excess water contract attached thereto.

8.2.2. If this agreement is terminated, then CAWCD shall be under no obligation to continue providing water in accordance with the agricultural pool and pricing policy for 2004 to 2030 adopted by the CAWCD Board of Directors.

9. Reallocation of NIA Priority Water

9.1. The provisions of this paragraph 9 shall become effective upon enactment of the Act.

9.2. Water Available to the Secretary for Indian Uses.

9.2.1. The first 197,500 acre-feet of NIA Priority water available under paragraph 5 for reallocation shall be reallocated by the Secretary as follows:

9.2.1.1. The Secretary shall reallocate 102,000 acre-feet to the Gila River Indian Community in accordance with the terms of the GRIC settlement.

9.2.1.2. The Secretary shall reallocate 28,200 acre-feet to the Tohono O'Odham Nation in accordance with the SAWRSA settlement.

9.2.1.3. The Secretary shall retain 67,300 acre-feet for reallocation to Arizona Indian tribes, subject to the following:

9.2.1.3.1. Such water may be reallocated to an Arizona Indian tribe only pursuant to an Indian water rights settlement for that tribe that has been approved by act of Congress;

9.2.1.3.2. Except as authorized by Congress, no water reallocated to an Arizona Indian tribe pursuant to this subparagraph may be leased, exchanged, forborne, or otherwise transferred in any way by the tribe for use directly or indirectly off the tribe's reservation.

9.3 Water Available to ADWR for Non-Indian M&I Uses.

9.3.1. After 197,500 acre-feet has been made available to the Secretary for reallocation under subparagraph 9.2, all remaining NIA Priority water available under paragraph 5

for reallocation shall be reallocated by the Secretary to ADWR to be held under a contract in trust for future use by non-Indian M&I water users.

9.3.2. If any NIA Priority water becomes available for reallocation as a result of the termination of a CAP subcontract amended as provided in subparagraph 6.6, the Secretary shall immediately amend the ADWR contract in trust to add the water from the terminated subcontract.

9.3.3. The ADWR contract in trust shall prohibit the direct use of water by ADWR.

9.3.4. The CAP water held by ADWR under its contract in trust ("Trust water") shall be reallocated to non-Indian M&I water users in accordance with ADWR policy and the following:

9.3.4.1. ADWR shall not make a recommendation to the Secretary for Trust water prior to January 1, 2010, but may thereafter recommend that any or all Trust water be reallocated to specified M&I water users. The Secretary shall act upon such recommendation in accordance with the Act.

9.3.4.2. ADWR shall make Trust water available for reallocation to non-Indian M&I water users within the State of Arizona at periodic intervals, starting in 2010. Only those M&I water users that meet the criteria established by ADWR shall be eligible to receive Trust water.

ADWR shall retain a sufficient amount of Trust water through 2030 to satisfy the rights of first refusal described in paragaphs 9.3.4.3 through 9.3.4.6.

9.3.4.3. Through 2020, M&I water providers serving the area shown on Exhibit 9.3.4.3 (the "CAIDD Area") that meet ADWR's eligibility criteria shall have a right of first refusal to 7.8% of the Trust water offered at each interval, up to an aggregate maximum of 7,500 acre-feet. Exhibit 9.3.4.3 shall be amended to exclude any lands for which NIA Priority water is being retained by CAIDD or its assignee(s) under an amended subcontract as provided in paragraph 6.

9.3.4.3.1. If, at the time ADWR makes Trust water available to non-Indian M&I water users, NIA Priority water is being retained by CAIDD or its assignee(s) under an amended subcontract as provided in paragraph 6, the retained water shall count against the aggregate maximum of 7,500 acre-feet for the CAIDD Area, but shall not count against the 7.8% right of first refusal unless the 7.8% plus the retained water would exceed 7,500 acre-feet.

9.3.4.3.2. If M&I water providers serving the CAIDD Area do not exercise their full right of first refusal, then the unexercised portion of that right shall carry forward to the next offering of Trust water.

9.3.4.4. Through 2020, M&I water providers serving the area shown on Exhibit 9.3.4.4 (the "MSIDD Area") that meet ADWR's eligibility criteria shall have a right of first refusal to 7.8% of the Trust water offered at each interval, up to an aggregate maximum of 7,500 acre-feet. Exhibit 9.3.4.4 shall be amended to exclude any lands for which NIA Priority water is being retained by MSIDD or its assignee(s) under an amended subcontract as provided in paragraph 6

9.3.4.4.1. If, at the time ADWR makes Trust water available to non-Indian M&I water users, NIA Priority water is being retained by MSIDD or its assignee(s) under an amended subcontract as provided in paragraph 6, the retained water shall count against the aggregate maximum of 7,500 acre-feet for the MSIDD Area, but shall not count against the 7.8% right of first refusal unless the 7.8% plus the retained water would exceed 7,500 acre-feet.

9.3.4.4.2. If M&I water providers serving the MSIDD Area do not exercise their full right of first refusal, then the unexercised portion of that right will carry forward to the next offering of Trust water.

9.3.4.5. From 2021 through 2030, the rights of first refusal described in paragraphs 9.3.4.3 and 9.3.4.4 shall be combined and shall be available to M&I water providers that are serving either the CAIDD Area or the MSIDD Area and that meet ADWR's eligibility criteria.

9.3.4.6. Beginning in 2030, if M&I water providers serving the CAIDD Area of MSIDD Area have not exercised their right of first refusal as to all of the Trust water available under paragraphs 9.3.4.3 through 9.3.4.5, then the Pinal County Water Augmentation Authority (PCWAA) shall have a right of second refusal as to the remainder of that water. PCWAAA must meet the criteria established by ADWR to be eligible to receive Trust water.

9.3.4.7. The rights of refusal described in paragraphs 9.3.4.3 through 9.3.4.6 do not limit the amount of Trust water that may be reassigned to M&I water providers in Pinal County. If M&I water providers in Pinal County request additional Trust water over and above the

amount available to them under their right of first or second refusal, ADWR shall consider their request for additional water on the same basis as requests for Trust water from M&I water providers serving other areas.

9.4. All NIA Priority water reallocated under this paragraph shall retain its NIA priority.

9.5. All reallocations made under subparagraphs 9.2 and 9.3 and all contracts for NIA Priority water reallocated under subparagraphs 9.2 and 9.3 shall be contingent on satisfaction of all conditions in subparagraph 13.3 and all conditions in the voluntary relinquishment agreements by the dates specified therein.

10. Reallocation of Currently Uncontracted M&I Priority Water.

10.1. The provisions of this paragraph 10 shall become effective upon enactment of the Act.

10.2. The Secretary shall allocate the Currently Uncontracted M&I Priority water as shown in Table 10.2.

Table 10.2

Applicant	Amount (acre feet)	Applicant	Amount (acre feet)
Town of Superior	285	AVRA Cooperative	808
Cave Creek Water Company	806	City of Chandler	4,986
Chaparral Water Company	1,931	Del Lago (Vail) Water Company	1,071

Town of El Mirage	508	City of Glendale	3,053
City of Goodyear	7,211	Community Water Company of Green Valley	1,521
H2O Water Company	147	Metropolitan Domestic Water Improvement District	4,602
City of Mesa	7,115	Town of Oro Valley	3,557
City of Peoria	5,527	City of Phoenix	8,206
City of Scottsdale	2,981	City of Surprise	2,876
Tucson Water	8,206	Valley Utilities Water Company	250
TOTAL			**65,647**

10.3. The Secretary and CAWCD shall offer M&I subcontracts to the above listed providers reflecting the amount of water in this reallocation in addition to any water already under contract to that provider. The new subcontract or amendment to existing subcontract shall conform to the requirements of subsections 104(d)(1) and (2) of the Act.

10.4. All contracts for Currently Uncontracted M&I Priority water allocated under this paragraph 10 shall be contingent on satisfaction of all conditions in subparagraph 13.3 by the date specified therein.

11. Allocation of Mainstream Colorado River Water

11.1. This paragraph 11 shall become effective upon execution of this agreement and shall survive termination of this agreement.

11.2. Upon execution of this agreement, the Secretary shall, in cooperation with the Mohave County Water Authority, amend Bureau of Reclamation Contract No. 5-07-30-W0320, dated December 12, 1995, to accomplish the following: (i) allocate and contract to Mohave County Water Authority 3,500 acre-feet of Arizona fourth priority mainstream Colorado River water; (ii) delete the allocation and contract of 3,500 acre-feet of Arizona fifth and sixth priority mainstream Colorado River water; and (iii) delete the reference to allocation of future NIA Priority water to Mohave County Water Authority.

11.3. The Secretary shall reserve 3,500 acre-feet of currently uncontracted Arizona fourth priority mainstream Colorado River water for use in a future Navajo-Hopi Indian water rights settlement. The water reserved under this subparagraph shall not be allocated, nor shall any contract be issued under the Boulder Canyon Project Act for the use of this water, until a final Indian water rights settlement for the Navajo Nation has been approved by Congress, finalizing Navajo claims to the mainstream of the Colorado River within Arizona.

12. Miscellaneous Provisions

12.1. MSIDD and CAIDD are express third party beneficiaries as to the rights of first refusal set forth in subparagraphs 9.3.4.3 through 9.3.4.6.

12.2. Nothing in this agreement is intended to affect any party's obligations under applicable law.

12.3. No party shall take any action that is inconsistent with the party's ability to perform its obligations under this agreement, including obligations that arise upon passage of the Act and fulfillment of the conditions of subparagraph 13.3 and the voluntary relinquishment agreements.

12.4. Nothing in this agreement may be used against either CAWCD or the United States in *Central Arizona Water Conservation District v. United States,* Nos. CIV 95-625-TUC-WDB (EHC) and CIV 95-1720-PHX-EHC (Consolidated Action). This subparagraph shall survive termination of this agreement.

13. Effectiveness and Termination

13.1. Except as expressly provided in paragraphs 5.2, 7, 9 and 10, this agreement is effective upon execution by the parties.

13.2. The United States may terminate this agreement if the total amount of water available for reallocation under paragraph 9 upon enactment of the Act is less than 197,500 acre-feet.

13.3. This agreement shall terminate if all of the following conditions have not been satisfied by December 31, 2007:

13.3.1. The Gila River Indian Community water rights settlement agreement has been executed by the parties thereto and has been authorized, ratified and confirmed by Congress.

13.3.2. This agreement has been authorized, ratified and confirmed by Congress.

13.3.3. Congress has passed legislation declaring the $73,561,337 in 9(d) debt identified in subparagraph 7.5 to be non-reimbursable and non-returnable to the United States.

13.3.4. Congress has passed legislation declaring land within the exterior boundaries of CAWCD or served by CAP water to be exempt from the Reclamation Reform Act and any other acreage limitation or full cost pricing provision of federal law.

13.3.5. Final judgment has been entered by the United States District Court for the District of Arizona in *Central Arizona Water Conservation District v. United States, et al.,* No. CIV-95-625-TUC-WDB (EHC), No. CIV-95-1720-PHX-EHC (Consolidated Action), in accordance with the CAP Repayment Stipulation.

13.3.6. Any other action or event as to which the Secretary is to publish a statement of findings under section 207(d) of the Act has occurred.

13.4. Except as expressly provided in paragraph 11 and subparagraphs 8.1 2 and 12.4, no provision of this agreement shall survive termination.

13.5. If the date by which the Secretary is required to publish a statement of findings under section 207(d) of the Act is amended by subsequent act of Congress, then the deadline for

satisfying the conditions in paragraph 13.3 will automatically be amended to conform.

UNITED STATES OF AMERICA

By: _____

Secretary of the Interior

CENTRAL ARIZONA WATER CONSERVATION DISTRICT

Attest: [Illegible] _____ By: /s/ George Renner _____
Secretary President

ARIZONA DEPARTMENT OF WATER RESOURCES

By: /s/ Joseph C. Smith _____
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[RELEVANT EXCERPTS]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PINAL

JOHN E. SMITH and MARY LOU SMITH, husband and wife; JOHN E. SMITH, as Trustee of the SMITH FAMILY TRUST; and PRETZER LAND AND CATTLE COMPANY, an Arizona corporation,

Plaintiffs,

v.

No. CV 2001-00924

JOINT STATEMENT OF FACTS

(Assigned to the Honorable Kelly Marie Robertson, Div. 5)

MARICOPA-STANFIELD IRRIGATION & DRAINAGE DISTRICT, an Arizona municipal corporation, and CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICT, and Arizona municipal corporation, political subdivisions of the State of Arizona,

Defendants.

The parties submit this agreed-to **JOINT STATEMENT OF FACTS** in an effort to clarify and limit factual and legal issues before the Court. This Statement of Facts is not intended to be comprehensive, and the parties do not waive their right to allege and prove additional facts or argue additional law not contained herein.

1. Plaintiffs are farmers who own land in Pinal County, Arizona. Plaintiffs John and Mary Lou Smith and the Smith Family Trust own land within the boundaries of Defendant Maricopa-Stanfield Irrigation & Drainage District ("MSIDD"), and Plaintiff Pretzer Land and Cattle Company owns land within the boundaries of Defendant Central Arizona Irrigation and Drainage District ("CAIDD"). MSIDD and CAIDD are also referred to herein collectively as "the Districts."

* * *

9. On December 5, 1972, Contract No. 14-06-W-245 was entered into between the United States and CAWCD for delivery of water and repayment of costs of the CAP (hereafter "1972 Master Contract"). On December 1, 1988, the Master Contract was amended (hereinafter "1988 Master Contract"). Upon judicial confirmation of the

December 1, 1988 Amendment, the 1972 Master Contract was to be superseded and replaced by the 1988 Master Contract. A true and correct copy of the 1972 Master Contract is attached hereto as Exhibit 1, and a true and correct copy of the 1988 Master Contract is attached as Exhibit 2.

* * *

17. Paragraph 8.8(b)(vi) of the 1972 Master Contract and of the 1988 Master Contract, further provided, in part, that the Secretary and the Contractor shall require in each subcontract that " . . . irrigation water made available thereunder may be made available by the Secretary for M&I purposes if and to the extent that such water is no longer required by the Subcontractor for irrigation purposes and shall be made available in all cases where lands receiving project water have been converted to municipal or industrial use; *Provided however*, That Subcontracts effectuating such transfers are subject to the approval of the Secretary and the Contractor, which approval shall not be withheld "unreasonably."

18. On November 21, 1983, each defendant irrigation district, as contemplated by the 1972 Master Contract, entered into a subcontract with the United States and the CAWCD. The terms of the District's Subcontracts are identical, except for the Districts' names and addresses, and amounts of water to be provided. A true and correct copy of CAIDD's Subcontract is attached hereto at Exhibit 3, and a true and correct copy of MSIDD's Subcontract is attached as Exhibit 4.

* * *

20. Each Subcontract provides in Article 4.1 in part, that the United States, subject to the Repayment Contract (the 1972 Master Contract), "shall deliver Project Water for Agricultural Use by the Subcontractor." "Project Water" as used in the Subcontracts, refers to Central Arizona Project water.

21. Each Subcontract provides in Article 4.2, in part, that its term is "for a period of 50 years beginning with the January 1 of the Year following that in which the Secretary issues the Notice of Contemplation of the Water Supply System." The Secretary issued the Notice of Completion of the Water Supply System during October of 1993.

* * *

25. Articles 5.1 and 5.2 of the Subcontracts require the Districts to pay a 2.00 per acre-foot capital charge (subject to modification), as well as an Agricultural Water Service Charge to cover a portion of the costs of operating, maintaining, and replacing the CAP facilities.

26. Article 5.2(e) of the Subcontracts further provides that the Districts' obligation to pay the charges specified in Articles 5.1 and 5.2 "is a general obligation of the [district] notwithstanding the manner in which the obligation may be distributed among the [district's] water users and notwithstanding the default of individual water users in their obligations to the [district]."

27. Article 5.2(f) of the Subcontracts further provides that payment of said charges is a condition precedent to delivery of water under the Subcontracts.

* * *

31. In 1962, MSIDD was organized as an irrigation and drainage district which operates and has authority pursuant to A.R.S. § 48-2901 *et seq.*

32. In 1964, CAIDD was organized as an irrigation and drainage district which operates and has authority pursuant to A.R.S. § 48-2901 *et seq.*

33. Defendants MSIDD and CAIDD are political subdivisions of the State of Arizona which were organized in part to provide CAP water to their user landowners pursuant to contracts. Defendant Districts deliver water to hundreds of Pinal County farmers. CAIDD covers 87,349.25 acres and includes approximately 214 individual landowners. MSIDD covers 87,142.6 acres and includes approximately 263 individual landowners.

34. The MSIDD and CAIDD Subcontracts " . . . give MSIDD and CAIDD the contractual right to receive Colorado River water through the CAP" to be distributed on behalf of the landowners pursuant to the terms of said Subcontracts, including payment of all costs set forth in Article 5 thereof. See Paragraph 25, supra.

* * *

41. MSIDD constructed an irrigation system to distribute within the district water from the CAP and groundwater from irrigation wells to be acquired from landowners in the district pursuant to water service contracts. . . .

* * *

43. In April 1989, Plaintiffs John E. and Mary Lou Smith entered into one or more identical water service contracts with MSIDD (entitled "Agreement"), which generally allowed the District during the term of such agreement to use the Smith's irrigation wells and irrigation grandfathered groundwater rights. Such water was to be used in conjunction with CAP water for irrigation as determined by the district.

* * *

46. When used in the MOUs and individual agreements for project water service, the "Project" water referred to means any water delivered through the Districts' entire water distribution systems but does not refer to any particular type of water.

47. MSIDD and CAIDD were organized for the benefit of their landowners.

RESPECTFULLY SUBMITTED this 2nd day of January, 2002.

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DUPLICATE – ORIGINAL

Contract No. 14-06-W-245
Amendment No. 1
B.C. Draft 11/28/88

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

CONTRACT BETWEEN THE UNITED STATES AND THE CENTRAL ARIZONA WATER CONSERVATION DISTRICT FOR DELIVERY OF WATER AND REPAYMENT OF COSTS OF THE CENTRAL ARIZONA PROJECT

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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

CONTRACT BETWEEN THE UNITED STATES AND THE CENTRAL ARIZONA WATER CONSERVATION DISTRICT FOR DELIVERY OF WATER AND REPAYMENT OF COSTS OF THE CENTRAL ARIZONA PROJECT

1. PARTIES

The parties to this contract, executed as of this first day of December, 1988, are the United States of America, acting through the Department of the Interior, and the Central Arizona Water Conservation District, a multi-county water conservation district organized under the laws of Arizona, with its principal place of business in Phoenix, Arizona.

2. AUTHORITIES

This contract is made pursuant to the:

2.1 Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof and supplementary thereto.

2.2 Boulder Canyon Project Act, approved December 21, 1928, 45 Stat. 1057, a supplement to the Federal Reclamation Laws.

2.3 Reclamation Project Act of 1939, approved August 4, 1939, 53 Stat. 1187, as amended.

2.4 Colorado River Basin Project Act, approved September 30, 1968, 82 Stat. 885, as amended, a supplement to the Federal Reclamation Laws.

2.5 Arizona Revised Statutes, Section 48-3701 *et seq.*

3. RECITALS

3.1 The Colorado River Basin Project Act provides, among other things, that for the purposes of furnishing irrigation water and municipal and industrial water supplies to water-deficient areas in Arizona and western New Mexico through direct diversion or exchange of water, control of floods, conservation and development of fish and wildlife resources, enhancement of recreation opportunities, and for other purposes, the Secretary of the Interior shall construct, operate, and maintain the Central Arizona Project, consisting of the principal works hereinafter described in Article 6.3.

3.2 Pursuant to the provisions of Arizona Revised Statutes, Section 48-3701 *et seq.*, the Central Arizona Water

Conservation District has been organized with the power to enter into a contract or contracts with the Secretary of the Interior to accomplish the purposes of Arizona Revised Statutes, Section 48-3701 *et seq.*

3.3 On December 15, 1972, the United States and the Contractor entered into a contract entitled "Contract Between the United States and the Central Arizona Water Conservation District for Delivery of Water and Repayment of Costs of the Central Arizona Project" (Contract No. 14-06-W-245), whereby, among other things, the United States agreed to construct the Central Arizona Project and the Contractor agreed to repay the costs of the project properly allocable to the Contractor.

3.4 Subarticle 9.3(b) of said contract provides that the Contractor's repayment obligation shall not exceed $1.2 billion.

3.5 Subarticle 9.3(b) of said contract also provides that if the Contractor's repayment obligation will exceed $1.2 billion, the Contracting Officer shall consult with the Contractor and continuation of construction will be contingent upon the execution of an amendatory contract to cover the increased repayment obligation.

3.6 Both parties acknowledge that the Contractor's repayment obligation will exceed $1.2 billion, and have agreed to increase the Contractor's repayment ceiling to a level sufficient to facilitate completion of the project.

4. ARTICLES OF AGREEMENT

NOW, THEREFORE, in consideration of the mutual and dependent stipulations and covenants herein contained, it is agreed by and between the parties hereto as follows:

5. DEFINITIONS

When used herein, unless otherwise distinctly expressed, or manifestly incompatible with the intent hereof, the terms:

5.1 "Federal Reclamation Laws" or "Reclamation Laws" shall mean the Act of June 17, 1902, 32 Stat. 388, and all acts amendatory thereof or supplementary thereto.

5.2 "Basin Project Act" shall mean the Colorado River Basin Project Act, 82 Stat. 885, dated September 30, 1968, as amended, which is a supplement to the Federal Reclamation Laws.

5.3 "Secretary" shall mean the Secretary of the Interior of the United States or his duly authorized representative.

5.4 "Contracting Officer" shall mean the Secretary or his authorized designee acting in his behalf.

5.5 "Contractor" shall mean the Central Arizona Water Conservation District, organized pursuant to Arizona Revised Statutes, Section 48-3701 *et seq.*

5.6 "Service area" shall mean the area now included within the Central Arizona Water Conservation District, consisting of Maricopa, Pinal, and Pima Counties of Arizona and such other counties as may hereafter become part of the District, exclusive of any Indian reservation land lying wholly or partly within said Counties.

5.7 "Subcontractor" shall mean any irrigation district, municipality, individual, or any entity which enters into a water service subcontract with the United States and the Contractor in furtherance of the provisions of the Basin Project Act.

5.8 "Central Arizona Project" or "project" shall mean the project and works authorized by Section 301(a) of the Basin Project Act and constructed by the United States pursuant to the provisions of said Act and this contract.

5.9 "Project works" shall mean the principal works described in Section 301(a) of the Basin Project Act, and appurtenances thereto, or as modified pursuant to Article 6.4 hereof, together with lands, interests in lands, and rights-of-way for such works and appurtenances.

5.10 "Water supply system" shall mean the Navajo Project, Havasu Pumping Plant, the Granite Reef, Salt Gila and Tucson aqueducts and associated pumping plants and appurtenant works, but not including Tucson Terminal Storage or any distribution works.

5.11 "Distribution works" shall mean those facilities constructed or financed by the United States under the authorization in Section 309(b) of the Basin Project Act for the primary purpose of distributing the project water supply within the service area after said project water supply has been transported or delivered through the water supply system.

5.12 "Agricultural water" or "irrigation water" shall mean project water used primarily in the commercial production of agricultural crops or livestock, including domestic use incidental thereto, on tracts of land operated in units of more than 5 acres.

5.13 "Miscellaneous water" shall mean water delivered from the project, or by exchange for project water, for recreational and fish and wildlife purposes at

other than project facilities and shall have a lesser priority of use than agricultural water.

5.14 "Municipal and industrial water," herein referred to as "M&I water," shall mean project water other than agricultural or miscellaneous water delivered by means of the project works.

5.15 "Lands not having a recent irrigation history" shall mean, except where otherwise determined by the Secretary for efficiency of subcontractor's operation, lands which the Secretary determines were not irrigated during the period September 30, 1958, to September 30, 1968.

5.16 "OM&R" shall mean the care, operation, maintenance, and replacement of project works.

5.17 "Exchange water" shall mean Colorado River water made available in exchange for or in replacement of existing supplies from surface sources other than the mainstream of the Colorado River.

5.18 "Transferred works" shall mean such facilities of the water supply system or of other construction stages as to which OM&R responsibility is transferred from the United States to the Operating Agency.

5.19 "Operating Agency" shall mean the entity or entities authorized to assume OM&R responsibility of transferred works and approved for that purpose by the Contracting Officer.

5.20 "Transfer notice" shall mean a written notice or notices, numbered consecutively, which the Contracting Officer transmits to the Operating Agency and which shall designate:

(a) the transferred works;

(b) items of equipment and supplies transferred to the Operating Agency; and

(c) the date upon which such transfer will be effected.

5.21 "Gila River system waters" shall mean waters of the Gila River and tributaries thereof east of the Yuma-Maricopa County line.

5.22 "Notice of completion" shall mean the notice which the Contracting Officer issues to Contractor to announce the substantial completion of a construction stage. Each such notice of completion shall include the estimated amount of the repayment obligation for the construction stage to which the notice pertains, the date of initiation of repayment for the construction stage and indicate the amount and due date for the first payment for the construction stage.

5.23 "Development Fund" shall mean the separate fund, known as the Lower Colorado River Basin Development Fund, established in the Treasury of the United States pursuant to Section 403(a) of the Basin Project Act.

5.24 "Year" shall mean the period January 1 through the next succeeding December 31.

5.25 "Contractor's Construction Cost Repayment Obligation," hereinafter referred to as "repayment obligation," shall mean the total amount of all construction costs including related construction claims and interest thereon, OM&R costs during construction, and interest on costs allocated to the M&I water and power functions during

construction, of the Central Arizona Project, incurred therefor and as determined by the United States and further described in Article 6.2 hereof, excluding reimbursable costs allocated to fish and wildlife and recreation, and costs associated with the delivery of water to entities other than the Contractor or subcontractors, and which is determined by the Secretary, after consultation with the Contractor, to be allocable to and repayable by the Contractor in accordance with the provisions of the Basin Project Act and this contract.

5.26 "Return flow" shall mean all agricultural, M&I, and miscellaneous waste water, seepage, and ground water which originates or results from water contracted for from the Central Arizona Project, but shall not include any water delivered through the project works for ground water recharge purposes.

5.27 "Project water" shall mean (a) all water allocated by the Secretary for project purposes by *Federal Register* notice dated March 24, 1983, and any subsequent reallocation by the Secretary as contemplated in paragraph 6 of said *Federal Register* notice, which water is available pursuant to contracts with the Secretary from: (1) the Colorado River; (2) Central Arizona Project dams and reservoirs; and (3) return flows captured by the Secretary for project use; (b) any water delivered to entities in Arizona, through the project works, as a replacement supply for Cliff Dam; (c) water delivered to water users in Arizona, through the project works, in exchange for water delivered to users in New Mexico from or by means of the project works; and (d) any additional water not included in (a) above, that is required to be delivered by the Secretary through the project, pursuant to the Ak-Chin Water Rights Settlement Act of 1978 (Public Law

95-328), as amended on October 19, 1984 (Public Law 98-530); the Southern Arizona Water Rights Settlement Act of October 12, 1982 (Title III of Public Law 97-293); and, subject to the execution of a settlement agreement by the Contractor providing for the settlement of the water rights claims of the Salt River Pima-Maricopa Indian Community and to the Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988 (Public Law 100-512), up to 22,000 acre-feet annually of Colorado River water to be delivered through the project works in accordance with said settlement agreement and legislation.

5.28 "Indian lands" shall mean the lands within any Indian reservation for which an allocation of project water has or will be made by the Secretary for delivery through project works.

5.29 "Navajo Project" shall mean the interests of the United States in the Navajo Generating Station and the Transmission System, or any replacement thereof, as authorized by Section 303 of the Basin Project Act and as described in contracts entered into pursuant to that Act.

5.30 "Construction stage" shall mean any one of the following: (1) the water supply system; (2) New Waddell and Modified Roosevelt Dams; (3) replacement features or programs for Cliff Dam; (4) Tucson terminal storage; (5) Hooker Dam or suitable alternative; and (6) Buttes Dam.

5.31 "Plan 6" shall mean Plan 6 for the Regulatory Storage Division of the Central Arizona Project as approved by Record of Decision of the Secretary dated April 3, 1984 as amended and supplemented by Records of Decision of the Secretary dated May 20, 1986 (Supplement One) and June 17, 1988 (Supplement Two).

5.32 "Allocable cost" shall mean (a) with respect to the project, the total project cost less (1) the cost of non-Indian distribution works, (2) the cost of the safety of dams component of Plan 6, (3) the cost of Indian distribution systems, (4) the cost of the Colorado River Division and the New Mexico fish hatchery, (5) the cost of cultural resources studies, (6) the contributions provided by the States of Arizona and New Mexico prior to execution of the Plan 6 Funding Agreement, (7) the costs of Charleston Dam and San Pedro Aqueduct, (8) the cost of 500 cubic feet per second of incremental capacity in the Granite Reef Aqueduct and related costs in the Navajo Project, and (9) such other costs as determined appropriate by the Contracting Officer; and (b) with respect to each construction stage, the total cost of such stage less that portion of the following costs associated with such stage: (1) the cost of the safety of dams component of Plan 6, (2) the cost of cultural resources studies, (3) the contributions provided by the States of Arizona and New Mexico prior to execution of the Plan 6 Funding Agreement, (4) the cost of 500 cubic feet per second of incremental capacity in the Granite Reef Aqueduct and related costs in the Navajo Project, and (5) such other costs as determined appropriate by the Contracting Officer.

5.33 "OM&R Transfer Contract" shall mean the August 5, 1987, contract entitled "Contract Between the United States of America and the Central Arizona Water Conservation District for the Transfer of Operation and Maintenance of Facilities" (Contract No. 7-07-30-W0167), and any amendment or revision thereof.

5.34 "Overall repayment period" shall mean the period of time beginning with initiation of repayment of

the first construction stage and ending with final payment of the last construction stage.

5.35 "Plan 6 Funding Agreement" shall mean the April 15, 1986, agreement entitled "Agreement Among the United States, the Central Arizona Water Conservation District, the Flood Control District of Maricopa County, the Salt River Agricultural Improvement and Power District and Salt River Valley Water Users' Association, the Arizona Cities of Chandler, Glendale, Mesa, Phoenix, Scottsdale, and Tempe, the State of Arizona, and the City of Tucson for Funding of Plan Six Facilities of the Central Arizona Project, Arizona, and for other Purposes," as it may be supplemented or amended.

5.36 "Permanent service" shall mean that water supply service commencing in the year following substantial completion of the water supply system and continuing in perpetuity.

5.37 "Ground water recharge" shall mean the recharge of water pursuant to title 45, chapter 2, article 13, Arizona Revised Statutes, or the underground storage and recovery of water pursuant to title 45, chapter 3, Arizona Revised Statutes, or as said statutes may hereafter be amended or revised.

5.38 "Project power" shall mean the United States' entitlement to capacity and energy from the Navajo Project.

6. PROJECT CONSTRUCTION

6.1 Agreement of the United States. Subject to the terms and conditions of this contract and within the limits of the funds made available therefor by Congress, the United States will expend toward the construction of the project, exclusive of interest costs during construction, $832,180,000 based on 1967 cost estimates, plus or minus

such amounts, if any, as may be justified by reason of ordinary fluctuations in construction costs as indicated by engineering cost indices applicable to the types of construction involved therein, or so much of such amount, as in the opinion of the Secretary, is necessary to construct said project, whichever amount is the lesser. The aforementioned amount includes the United States' costs of participation in the Navajo Project.

6.2 Costs of Protect.

(a) The estimated construction cost of $832,180,000 for the project, based upon 1967 prices, has been determined as follows:

Main System	$ 1,000's
Granite Reef Division	407,740
Orme Division	42,340
Salt-Gila Division	47,170
Tucson Aqueduct (Colorado River source)	46,300
Buttes Dam	35,240
Navajo Project	106,000
Subtotal	684,790
Other Separate Features	
Hooker Dam or suitable alternative	31,730
Charleston Dam and San Pedro Aqueduct (San Pedro River source)	36,420
Subtotal	68,150
Miscellaneous Features	
*Gila River Division	5,250
Indian Distribution System	19,970
Colorado River Division	42,450
Drainage System	11,570
Subtotal	79,240
Total Project	$832,180

*Note: Fish hatchery costs, some of which may be located on the Colorado River.

Provided, however, That (i) the adjustment provisions of Article 6.1 apply to the total construction costs of the project and not to the costs of the individual line items set out in this Subarticle 6.2(a), and (ii) in accordance with provisions of Article 6.4 herein, the references to the individual line items set out in this Subarticle 6.2(a) are not to be deemed a determination that each of the features referred to in the individual line items will be constructed or that costs will be incurred for each of said individual line items based upon a percentage which the estimated costs for each individual line item bears to the project's total estimated construction costs.

(b) The Central Arizona Project costs incurred by the United States which are to be repaid by Contractor shall include the share allocated to the Contractor of (i) construction costs of the project, (ii) all expenses of whatsoever kind or nature heretofore or hereafter incurred by the United States in connection with, growing out of, or resulting from the construction, and (iii) the OM&R during construction of project works. The aforementioned share of allocated costs shall also include, but shall not be limited to, interest during construction on costs allocated to the M&I water and power functions, the cost of labor, materials, equipment, engineering, legal services, surveys, investigations, property, superintendence, administration, overhead, general expenses, special services, damages of all kinds and character, inspection, repair, and protection of project works and water supply, and the costs of all lands, interests in lands, and rights-of-way acquired by the United States for the project, all as determined by the Secretary.

6.3 Principal Works of the Project. The works and facilities to be constructed under this contract shall consist of the following principal works:

(a) A system of main conduits and canals, including the Havasu Pumping Plant and a main canal and pumping plants (Granite Reef Aqueduct and pumping plants), for diverting and carrying water from Lake Havasu to the confluence of the Salt and Verde Rivers, which system will have a capacity of 3,000 cubic feet per second;

(b) Salt-Gila Aqueduct and pumping plant;

(c) Tucson Aqueduct and pumping plants;

(d) New Waddell and Modified Roosevelt Dams;

(e) replacement features or programs for Cliff Dam;

(f) Tucson Terminal Storage (if approved by the Secretary);

(g) Buttes Dam and Reservoir;

(h) Hooker Dam and Reservoir or suitable alternative which shall be constructed in such manner as to give effect to the provisions of Section 304(f) of the Basin Project Act;

(i) Charleston Dam and Reservoir and the San Pedro Aqueduct;

(j) related canals, regulating facilities, and electric transmission facilities required for the operation of said principal works;

(k) related water distribution and drainage works; and

(l) appurtenant works.

No works or facilities for the treatment of water are included in the project works to be constructed by the United States. Nothing contained herein shall be construed to indicate the order in which the aforedescribed works will be constructed.

6.4 Changes in Project Works. Should the Secretary, either before or during construction, determine it to be in the best interests of the project, he may, upon the completion of the studies currently being made or to be made, including land classifications, hydrological, engineering, geological, sedimentation, water supply, and repayment ability, and after consultation with the Contractor, change the location, size, or capacity of any of the project works, or may eliminate works, or add works to those described above, and the Secretary's decision on such changes, eliminations, and additions shall be conclusive.

6.5 Construction Conditions. The United States shall be under no obligation to commence or, having commenced, to continue construction of project works until transfer from the State of Arizona of such State-owned lands or interests therein, in a form acceptable to the Attorney General of the United States, as the Secretary determines is necessary in the construction, operation, or maintenance of the project.

6.6 Annual Work Program. During construction of the project works the Contracting Officer will consult with the Contractor and/or with any subcontractor through or within whose service area project works are to

be constructed to achieve maximum coordination between such construction program and the annual programs of any affected subcontractor. Within 30 days following the enactment by Congress and Presidential approval of annual or supplementary appropriation acts and the allotment of funds thereunder for continued construction of the project, the United States will furnish the Contractor with a notice and statement showing the proposed construction program for the balance of the current fiscal year and for the following fiscal year or years. If so requested in writing by the Contractor within 30 days of its receipt of such notice, the Secretary will consult with the Contractor and/or the affected subcontractor with respect to the proposed program. The action of the Contracting Officer concerning the program after such consultation shall be final.

6.7 Inability of the United States to Complete Project on Basis of Cost Estimates. If construction of the project works shall have been commenced but, prior to completion, the Secretary determines that the cost of constructing the project will exceed the maximum amount to be expended therefor by the United States as provided for in Article 6.1 hereof, the Secretary may after consultation with the Contractor terminate construction and declare the obligations of the United States hereunder with regard to completion of construction of the project to have been fulfilled. If appropriations for the continuance and/or completion of construction in amounts sufficient in the opinion of the Secretary to complete said construction are authorized by Congress and are available, the Secretary shall consult with the Contractor and shall make continuation of construction contingent upon the execution of an amendatory contract with the Contractor wherein

the Contractor's maximum repayment obligation is increased so as to cover the increased reimbursable costs as determined by the Secretary; *Provided, however,* That the Contractor shall not utilize any part of the completed or unfinished project facilities in the absence of written agreement with the Secretary for reimbursement therefor.

7. PROJECT OPERATION, MAINTENANCE, AND REPLACEMENT

7.1 Operation and Maintenance and Water Deliveries by the United States Prior to Completion of Construction. Except as provided in the OM&R Transfer Contract, prior to completion of project works by the United States, as determined and announced to the Contractor in writing by the Secretary, the United States will operate and maintain said project facilities. The cost of said OM&R allocated to the Contractor shall be included in the Contractor's repayment obligation; *Provided, however,* That said OM&R cost shall not be included with the project cost ceiling set out in Article 6.1 hereof. During the aforesaid period, project water, if available, may be disposed of by the Secretary at charges which the Secretary determines to be appropriate; *Provided, however,* That to the extent deemed feasible by the Secretary, preference will be given to subcontractors and Indian lands. Payment for water shall be made in advance by the water user. The places of measurement and delivery of said water shall be established by the Secretary after consultation with the Contractor. Except as provided in the OM&R Transfer Contract, the proceeds accruing from the disposal of such water shall be credited to the Development Fund and applied toward the costs of the project as determined by the Secretary.

7.2 Operation and Maintenance and Water Deliveries after Completion of Construction. Except as provided in the OM&R Transfer Contract and any future agreements for the transfer of OM&R of the project works or portions thereof, upon completion of construction of a construction stage or upon completion of construction of the project, the United States shall operate and maintain such construction stage or the project and shall make project water available to project water users.

8. DELIVERY OF WATER

8.1 Obligation of United States. Subject to the terms, conditions, and provisions set forth herein, the United States will deliver project water to Contractor and, during such periods as it operates and maintains the water supply system, the United States will also transport and deliver said water to the subcontractors. After transfer of OM&R the United States will awake deliveries of Colorado River water to the Operating Agency; deliveries of other project waters will be made pursuant to determinations made by the Secretary.

8.2 Term of Contract. Subject to the terms, conditions, and provisions set forth herein, this contract is for permanent service.

8.3 Conditions Relating to Delivery.

(a) The obligation of the United States to deliver water under this contract is subject to:

(i) The availability of such water for use in Arizona under the provisions of the Colorado River Compact, executed November 24, 1922;

the Boulder Canyon Project Act, 45 Stat. 1057, dated December 21, 1928; the Colorado River Basin Project Act, dated September 30, 1968, 82 Stat. 885; the contract between the United States and the State of Arizona, dated February 9, 1944; the Opinion of the Supreme Court of the United States in the case of *Arizona* v. *California et al.*, 373 U.S. 546, rendered June 3, 1963; and the March 9, 1964, Decree of that Court in said case, 376 U.S. 340, as amended on February 28, 1966, at 383 U.S. 268, and supplemented on January 9, 1979, at 439 U.S. 419, as now issued or hereafter modified.

(ii) Executive A, Seventy-eighth Congress, Second Session, a treaty between the United States of America and the United Mexican States, signed at Washington on February 3, 1944, relating to the utilization of the water of the Colorado River and Tijuana River and of the Rio Grande from Fort Quitman, Texas, to the Gulf of Mexico, and Executive H, Seventy-eighth Congress, Second Session, a protocol signed at Washington on November 14, 1944, supplementary to the Treaty.

(iii) The express understanding and agreement by the Contractor that this contract is subject to the condition that Hoover Dam and Lake

Mead shall be used: first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of the Colorado River Compact approved by Section 13(a) of the Boulder Canyon Project Act; and third, for power; and furthermore, that this contract is made upon the express condition and with the express covenant that all rights hereunder shall be subject to and controlled by the Colorado River Compact and that the United States and the Contractor shall observe and be subject to and controlled by said Colorado River Compact and Boulder Canyon Project Act in the construction, management, and operation of Hoover Dam, Lake Mead, canals and other works, and the storage, diversion, delivery, and use of water to be delivered to Contractor hereunder.

(iv) The right of the United States temporarily to discontinue or reduce the amount of water to be delivered hereunder whenever such discontinuance or reduction is made necessary for purposes of investigations, inspections, replacements, maintenance, or repairs to any works whatsoever affecting, utilized or, in the opinion of the Secretary, necessary for delivery of

water hereunder, it being understood that so far as feasible the United States will (1) do so during periods of low water demands and (2) give reasonable notice in advance of such temporary discontinuance or reduction.

(b) Delivery of Colorado River water by the United States under this contract shall be charged to the State of Arizona's apportionment under the aforementioned Supreme Court Decree of March 9, 1964, in *Arizona* v. *California* and will discharge to that extent the obligation of the United States to deliver water under the aforementioned contract between the United States and the State of Arizona, dated February 9, 1944.

8.4 Delivery Points. Colorado River water to be furnished to the Contractor pursuant to this contract will be delivered by the United States in the Colorado River at the point of diversion from Lake Havasu where the intake structures of the Havasu Pumping Plant are constructed. Aqua Fria and Upper Gila River system waters will be delivered to the Contractor at New Waddell and Buttes Dams, respectively. Delivery points for other project water supplies and for return flows will be determined by the Contracting Officer after consultation with the Contractor and/or the affected subcontractor therefor.

8.5 Measurement.

(a) The quantity of Colorado River water pumped from Lake Havasu for the project shall be measured by means of measuring devices to be installed as part of the project works. If, for any reason, in the opinion of the Secretary, said measuring devices shall fail to operate

satisfactorily, the Secretary will, from the best information available, estimate the amount of water delivered to the Contractor.

(b) Deliveries of project water to the various subcontractors shall be measured by means of measuring devices to be installed as part of the project works at the points along the various aqueducts at which such water may be diverted for each of said subcontractors, and/or at the points in the various reservoirs formed by the dams constructed as part of the project works at which such water may be diverted for subcontractors and/or at the points where return flow may be delivered. These points of measurement will be established by the Secretary after consultation with Contractor and the affected subcontractor. If, for any reason, in the opinion of the Secretary, said measuring devices shall fail to operate satisfactorily, the Secretary will, from the best information available and after consultation with the Contractor and the affected subcontractor, estimate the amount of water delivered to each such subcontractor. The Secretary shall at all times have access over any lands and rights-of-way of a subcontractor for the purpose of inspecting and checking said measuring devices.

8.6 Responsibility for Distribution of Water after Leaving Water Supply System. Whether or not the United States operates and maintains the project facilities, the United States shall not be responsible for the control, carriage, handling, use, disposal, or distribution of water after said water has been diverted from the water supply system. At such time as the Operating Agency assumes responsibility for the OM&R of project works, the responsibility for diversion, carriage, and transportation of the water through the water supply system shall be the sole

responsibility of the Operating Agency. Responsibility for distribution of water beyond the water supply system shall be that of the subcontractors to whom said water is delivered from the water supply system. The United States, its officers, agents, and employees, shall not be liable for damage or claim of damage of any nature whatsoever for which there is legal responsibility arising out of or connected with the control, carriage, handling, use, disposal, or distribution of such water, and each subcontractor shall hold the United States, its officers, agents, and employees, harmless from any and all such claims.

8.7 Quantity of Water to be Delivered.

(a) The Secretary reserves the right to determine that quantity of Colorado River water to be released each year from Lake Mead for use by the Central Arizona project pursuant to applicable law, which shall include the quantity of water which may be allocated by the Secretary for use on Indian lands.

(b) The quantity of Colorado River water available under this contract for project purposes shall not exceed the quantity of water available to Arizona under the aforementioned Supreme Court Decree in *Arizona* v. *California* and in Arizona's water delivery contract with the United States after first providing for satisfaction of:

(i) present perfected rights and perfected rights described in Article II(D) of the Decree and the rights of other Federal reservations established prior to September 30, 1968; *Provided, however,* That the quantities of Colorado River water reserved to satisfy the aforesaid rights shall not, except as provided

in said Decree, be reduced under any circumstances or for any reason whatsoever including, without limitation, a temporary use permitted by the Secretary by other water users in Arizona, California, or Nevada, of water reserved pursuant to the foregoing but not needed during any calendar year; And *provided further,* That no rights to the recurrent use of such water shall accrue by reason of said temporary use; and

(ii) the quantities of water provided for in all water delivery contracts between the United States and water users in Arizona as of September 30, 1968.

(c) The quantity of Colorado River water available under this contract for project purposes, including water for use on Indian lands shall have the same priority as to delivery as the quantities of Colorado River water delivered pursuant to water delivery contracts, Federal reservations of water, and other arrangements between the United States and water users in Arizona entered into subsequent to September 30, 1968, for use of Colorado River water on Federal, State or privately owned lands in Arizona in total quantities not to exceed 164,652 acre-feet of diversions per year; *Provided, however,* That the Contractor shall hold the United States, its officers, agents, employees, and successors or assigns, harmless as to any and all claims for damages to persons or to property direct or indirect and of whatever nature, arising out of or which may in any manner be connected with the operation and/or effect of this Subarticle.

(d) The limitation on contracting in Subarticle 8.7(c) above shall not apply to contracts with holders of present perfected rights to Colorado River water in Arizona or to the Secretary's order of November 24, 1982, reserving Colorado River water for the Cibola National Wildlife Refuge. Nothing in Subarticle 8.7(c) shall restrict the right of the Secretary under water service contracts referred to in said Subarticle to terminate and/or reduce any entity's entitlement to Colorado River water and to make that entitlement available to other water users in Arizona.

(e) During any year when the subcontractors cannot use any portion of their entitlement to project water, and such water cannot be resold or exchanged in accordance with the terms and conditions of the water service subcontracts, the Contractor shall have the right in its discretion to resell any or all of such water or to use any or all of such water for ground water recharge purposes, including the subsequent recovery and resale of such water, subject to Federal law, including but not limited to the Reclamation Reform Act of 1982, State of Arizona law, and such rules and regulations as the Secretary may deem appropriate. Subject to the terms and conditions of water service subcontracts, the water orders of all subcontractors shall be met before any project water is made available to the Contractor under this provision.

8.8 Subcontracts.

(a) The United States shall be a party to subcontracts.

(b) The Secretary and the Contractor shall require in each subcontract that:

(i) unless and until otherwise provided by Congress, water from the Central Arizona Project shall not be made available directly or indirectly for the irrigation of lands not having a recent irrigation history, as determined by the Secretary, except in the case of Indian lands, national wildlife refuges, and, with the approval of the Secretary, State-administered wildlife management areas;

(ii) there be in effect measures, adequate in the judgment of the Secretary and the Contractor, to control expansion of irrigation from aquifers affected by irrigation in the Contractor's service area and to reduce pumping of ground water in the agricultural subcontractors' service areas by the amount of project water received by said agricultural subcontractors;

(iii) the canals and distribution systems through which water is conveyed after its delivery to the subcontractors shall be provided and maintained with linings adequate in the Secretary's judgment to prevent excessive conveyance losses;

(iv) neither the Secretary, the Contractor nor any subcontractor shall pump or permit others to pump ground water from within

the exterior boundaries of the service area of a subcontractor receiving water from the Central Arizona Project for any use outside of said subcontractor's service area unless the Secretary, the Contractor, and such subcontractor shall agree, or shall have previously agreed, that a surplus of ground water exists and that drainage is or was required;

(v) except as otherwise agreed by the Contracting Officer, neither the Contractor nor any subcontractor shall sell or otherwise dispose of or permit the sale or other disposition of any project water, including return flows, for use outside the Contractor's service area;

(vi) irrigation water made available thereunder may be made available by the Secretary for M&I purposes if and to the extent that such water is no longer required by the subcontractor for irrigation purposes and shall be made available in all cases where lands receiving project water have been converted to municipal and industrial use; *Provided, however,* That subcontracts effectuating such transfers are subject to the approval of the Secretary and the Contractor, which approval shall not be withheld unreasonably; And *provided further,* That it shall be deemed unreasonable for

the Secretary or the Contractor to withhold such approval on the basis that the right to convert from irrigation to M&I use for a specific development could better be exercised in some other subcontractor's service area. The water so converted from irrigation to M&I purposes will be delivered with the same priority and at the same rate per acre-foot as other M&I water. Likewise, subcontracts for furnishing water for M&I purposes, including, but not limited to, ground water recharge to the extent ground water recharge is consistent with Arizona law, shall provide that, if water to be delivered thereunder is not presently required for such purposes, such water may be made available by the Secretary to other users; *Provided, further,* That the subcontractor shall be relieved of its payment obligation under its subcontract only to the extent of the amount paid by such other users;

(vii) the acreage limitation provisions of Reclamation Laws shall apply solely to agricultural water service;

(viii) except as specifically provided therein, it shall be the provisions of this contract which shall be controlling in the event of any inconsistency between this contract and any subcontract;

(ix) the subcontractor shall levy all necessary assessments, tolls, and other charges and shall use all of the authority and resources available to the subcontractor to collect the same in order that the subcontractor may meet its obligations thereunder to make in full all payments required under said subcontract on or before the date such payments become due and to meet other obligations under the subcontracts;

(x) the subcontractor establish, maintain, and provide the United States and the Contractor with land, water use, and crop census records.

8.9 Shortages. As provided in Section 301(b) of the Basin Project Act, Article II(B)(3) of the Decree of the Supreme Court of the United States in *Arizona* v. *California,* 376 U.S. 340, dated March 9, 1964, shall be so administered that in any year in which, as determined by the Secretary, there is insufficient mainstream Colorado River water available for release to satisfy the annual consumptive use of 7,500,000 acre-feet in Arizona, California, and Nevada, diversions from the mainstream of the Colorado River for the Central Arizona Project and for other uses in Arizona under contracts or other agreements with the United States executed subsequent to September 30, 1968, shall be so limited as to assure the availability of water in quantities sufficient to provide for the aggregate annual consumptive use by holders of present perfected rights, by other users in the State of

California served under contracts existing as of September 30, 1968, with the United States by diversion works heretofore constructed, and by other Federal reservations in California of 4,400,000 acre-feet of Colorado River water, and by users of the same character in Arizona and Nevada. Water users in the State of Nevada shall not be required to bear shortages in any proportion greater than would have been imposed in the absence of said Section 301(b), nor shall said Section affect the relative priorities, among themselves, of water users in Arizona, California, and Nevada which are senior to diversions for the Central Arizona Project, or amend any provisions of said Decree. The aforesaid limitation stated in Section 301(b) shall not apply so long as the Secretary shall determine and proclaim that means are available and in operation which augment the water supply of the Colorado River system in such quantity as to make sufficient Colorado River mainstream water available for release to satisfy annual consumptive use of 7,500,000 acre-feet in Arizona, California, and Nevada.

8.10 Rate of Diversions of Colorado River Water. Subject to (a) the first proviso in Section 301(a) of the Basin Project Act, (b) the provisions of Subarticle 10.6(b) hereof, and (c) the provisions of Subarticle 8.7(a) hereof, any capacity in the Granite Reef Aqueduct in excess of 2,500 cubic feet per second may be utilized in the operations of the project so as to maximize project benefits; *Provided*, *however*, That the use of such capacity shall not result in the annual diversion of a quantity of water in excess of the project's legal entitlement under the Basin Project Act.

8.11 Priority in Case of Shortage.

(a) Subject to the provisions of Section 304(e) of the Basin Project Act and the Secretary's allocation decisions published in the *Federal Register* on December 10, 1980, and March 24, 1983, any project water as defined in Subarticle 5.27(a) hereof, furnished through project facilities shall, in the event of shortages thereof, be reduced pro rata until exhausted, first for miscellaneous uses and next for agricultural uses, before such project water furnished for M&I uses is reduced. Thereafter, such project water for M&I uses will be reduced pro rata among all M&I water users. Each subcontract or other water delivery arrangement entered into pursuant to this contract shall so provide. This article shall not apply to Indian uses; *Provided*, *however*, That the relative priorities between Indian and non-Indian uses shall be as determined by the Secretary. Notwithstanding the provisions of this Subarticle, project water made available as a result of construction and operation of modifications to Roosevelt Dam as part of Plan 6 shall be distributed as provided in the Plan 6 Funding Agreement, and shall not be subject to reduction in the event of shortages of other project water supplies.

(b) Any project water, is defined in Subarticles 5.27(b), (c) and (d) hereof, shall retain its priority relative to project water as defined in Subarticle 5.27(a) hereof.

8.12 No Guarantee of Availability of Water. The United States assumes no responsibility with respect to the quantity of water available for delivery pursuant to this contract. In no event shall the United States, its officers, agents, or employees, be liable for any damages,

direct or indirect, of whatsoever nature, arising out of or in any way connected with any suspension or reduction in the delivery of water pursuant to this contract or with any shortage in the quantity of water available for delivery hereunder or to any subcontractor for any cause whatsoever including, but not limited to, drought, delay in the construction of the Navajo Project, the failure of the Navajo Project to be completed, or the lack of power for pumping.

8.13 Secretarial Control of Return Flow.

(a) The Secretary reserves the right to capture all return flow flowing from the exterior boundaries of the Contractor as a source of supply and for distribution to and use of the Central Arizona Project to the fullest extent practicable. The Secretary also reserves the right to capture for project use return flows within the boundaries of Contractor if in his judgment such return flow is not being put to a beneficial use. Any subcontractor may sell its return flow; *Provided, however*, That except as otherwise agreed by the Contracting Officer, such return flow may not be sold for use outside the Contractor's exterior boundaries; *And provided further*, That if the price received for such return flow is higher than the price paid for such project water, the amount of the excess price shall be paid by such subcontractor to the Contractor for application against the Contractor's repayment obligation to the United States.

(b) Any return flow captured by the United States and determined by the Secretary to be suitable and available for use on lands within the service area and/or by any subcontractor therein may be delivered by the United States to a subcontractor as a part of the water

supply for which the subcontractor contracts hereunder and such water shall be accounted and paid for pursuant to the provisions hereof.

8.14 Water and Air Pollution Control. The Contractor, in carrying out this contract, shall comply with all applicable water and air pollution laws and regulations of the United States and the State of Arizona, and shall obtain all required permits or licenses from the appropriate Federal, State, or local authorities.

8.15 Quality of Water. The operation and maintenance of project facilities shall be performed in such manner as is practicable to maintain the quality of project water made available through such facilities at the highest level reasonably attainable as determined by the Contracting Officer or the Operating Agency. Neither the United States nor the Operating Agency warrants the quality of water and are under no obligation to construct or furnish water treatment facilities to maintain or better the quality of water.

8.16 Exchange Water. Where the Secretary determines that a subcontractor is physically able to receive Colorado River mainstream water in exchange for or in replacement of existing supplies of surface water from sources other than the Colorado River to provide water supplies for users upstream from New Waddell, Modified Roosevelt and Buttes Dams, the Secretary may require that said subcontractor agree to accept said mainstream water in exchange for or in replacement of said existing supplies pursuant to the provisions of Section 304(d) of the Basin Project Act.

8.17 Rights Reserved to the United States to Have Water Carried by Project Facilities. As a condition to

the construction of project facilities and the delivery of water hereunder, the Contractor agrees that all project facilities will be available for the diversion, transportation, and carriage of water for Indian and non-Indian uses pursuant to arrangements or contracts therefor entered into on their behalf with the Secretary. In the event the responsibility for the OM&R of project facilities is transferred to and assumed by the Operating Agency, such transfer shall be subject to the condition that the Operating-Agency shall divert, transport, and carry such water for such uses pursuant to the provisions of the aforesaid arrangements or contracts; *Provided, however*, That the aforesaid arrangements or contracts will include provisions for the payment of applicable construction costs and OM&R costs in accordance with Articles 9.3 and 9.6 of this contract.

8.18 Wheeling Non-Project Water. After taking into consideration the water delivery requirements of contracts for project water service and subject to availability of project capacity, non-project water may be wheeled through project facilities pursuant to wheeling agreements between the Contractor and the entity desiring to use project facilities for wheeling purposes. All such agreements shall be subject to the approval of the Contracting Officer who shall consider, among other things, the impact that the wheeling of such non-project water will have on the quality of project water. The Contractor and the Contracting Officer shall jointly develop a standard form of wheeling agreement including the rate structure for wheeling non-project water. All wheeling charges shall be paid to the Contractor by the entity contracting for the wheeling of non-project water. The Contractor shall be

entitled to retain revenues from wheeling charges sufficient to cover all OM&R costs associated with wheeling such non-project water, plus an administrative charge to be jointly determined by the Contractor and the Contracting Officer. All revenues from wheeling charges in excess of the OM&R costs and administrative charges shall be remitted by the Contractor to the Contracting Officer and deposited into the Development Fund.

8.19 Use of Project Power to Wheel Non-Project Water. If the energy requirements necessary for the pumping of project water are met and subject to the requirements of the Navajo Power Marketing Plan published in the *Federal Register* on December 21, 1987, project power may be used to wheel non-project water through project facilities under such conditions of use, including amounts, times of use, losses, costs, and other conditions as are established by the Contractor and approved by the Contracting Officer.

9. PAYMENT OF PROJECT COSTS ALLOCATED TO CONTRACTOR

9.1 Allocation of Construction Costs.

(a) Upon completion of each construction stage, the Contracting Officer will allocate costs to the various project purposes using the separable costs-remaining benefits procedure.

(b) For repayment purposes the reimbursable cost allocated to irrigation and M&I water by the separable costs-remaining benefits procedure will be combined and will hereinafter be termed the "water supply allocation." Upon completion of each construction stage,

and at the periodic intervals specified in Subarticle 9.3(d), suballocation of the water supply allocation will be made to the irrigation and M&I water functions proportional to the water estimated to be used for each purpose during the repayment period of each construction stage. The cost thus suballocated to the irrigation function will hereinafter be termed the "interest-free allocation." The cost thus suballocated to the M&I water function shall be added to the cost allocated to the commercial power function, plus interest during construction for both, and the sum will hereinafter be termed the "interest-bearing allocation."

(c) During construction, simple interest at the rate of 3.342 percent per annum shall be charged on costs allocated to the interest-bearing function as adjusted by the Secretary (i.e., net disbursements reduced by contract holdbacks, revenues applied to construction cost, and nonreimbursable expenses financed from construction funds). The total amount of all interest thus accumulated through the construction period prior to the date of completion of each construction stage shall be added to and become part of the actual construction cost of each construction stage. Interest during construction shall not accrue during any period in which construction is deferred or postponed by the United States as a result of a national emergency, as determined by the Secretary, if authority to forego such interest exists or is made available to the Secretary.

9.2 Repayment Concepts.

(a) Costs suballocated to non-Indian irrigation water will be paid by the subcontractors to the Contractor on the basis of their ability to pay as determined by the Secretary.

(b) Costs allocated to commercial power and costs suballocated to M&I water use shall be combined and repaid with interest at a rate of 3.342 percent per annum on the unpaid balance.

(c) Reimbursable costs allocated to recreation and fish and wildlife are anticipated to be covered by a separate contract and repaid by the beneficiaries thereof.

(d) Repayment of costs allocated to irrigation of Indian lands shall be governed by the provisions of Section 402 of the Basin Project Act.

(e) Repayment of the project will occur by construction stages, with each stage having a separate 50-year repayment schedule. Upon completion of each cost allocation study referred to in Subarticle 9.1(a), subsequent to the initial study associated with the first construction stage, the Contractor's repayment obligation and the obligation allocated to each construction stage will be adjusted based on the latest cost allocation study, and the Contractor will be provided with a revised repayment schedule for the project and each construction stage. The Contracting Officer will adjust previous principal and interest payments made by the Contractor to reflect the new repayment schedule. For each year where an adjustment in payments is necessary, there will be an over or underpayment which will accrue with interest at the rate of 3.342 percent per annum (compounded annually) to the adjustment date. If the adjustment indicates that the Contractor overpaid principal and interest, the Contractor shall be entitled to a credit against its next payments to the United States. Conversely, if the Contractor owes additional principal and interest to the United States, such amount shall be paid to the United States by the

Contractor within 12 months of receipt of a statement therefor from the Contracting Officer. The Contractor may use the repayment reserve fund under Subarticle 10.3(b) hereof for any payment to the United States required as a result of the above adjustment.

9.3 Contractor's Construction Cost Repayment Obligation.

(a) The Contractor's repayment obligation shall consist of the total cost allocated to the water supply and power functions plus OM&R during construction and interest during construction on costs allocated to the M&I water and power functions, but shall not include costs allocated to fish and wildlife and recreation, and costs associated with the delivery of water to entities other than the Contractor or subcontractors. Such entities shall include but not be limited to Indian tribes and councils in central Arizona receiving project water and the New Mexico recipients of water service from Hooker Dam or suitable alternative. The costs to be excluded shall be calculated as follows:

(i) Costs excluded from the Contractor's repayment obligation for New Mexico water service shall be determined by multiplying the project costs allocated to the water supply function by the ratio developed by dividing the quantity of project water projected to be delivered throughout the overall repayment period to water users in Arizona in exchange for water delivered to users in New Mexico from or by means of project works, by the total quantity of Colorado River water

projected to be delivered by the project throughout the overall repayment period.

(ii) The amount of other project costs which shall be excluded from the Contractor's repayment obligation shall be determined by multiplying the project costs allocated to the water supply function by a ratio developed by dividing the quantity of project water projected to be delivered throughout the overall repayment period to entities other than the Contractor, the subcontractors, and those users in New Mexico to whom water has been made available through the construction of Hooker Dam or suitable alternative by the total quantity of project water projected to be delivered throughout the overall repayment period; *Provided*, That project water projected to be delivered to such users will be computed based on an assumption of full development not later than the year 2005.

(b) The costs determined under Subarticles 9.3(a)(i) and (ii) above shall be subtracted from the water supply costs obtained from the separable costs-remaining benefits procedure to determine the Contractor's water supply costs. The Contracting Officer shall suballocate the Contractor's water supply costs to each of the construction stages based on the ratios obtained by dividing the allocable cost of the construction stage by the allocable cost of the project (see Operation 1, Exhibit "A"). The water

supply costs assigned to each construction stage are then further suballocated between irrigation and M&I water use in proportion to projected total water deliveries to each function over the 50-year repayment period of each construction stage (Operation 2, Exhibit "A"). The summarization of the suballocations to each construction stage determines the total water supply cost to be assigned to irrigation and M&I water use (Operation 3, Exhibit "MA"). To determine the Contractor's repayment obligation, the Contractor's water supply suballocation to irrigation and M&I water uses, and the power allocation from the separable costs-remaining benefits procedure, shall each be adjusted for any revenues received by the United States prior to the notice(s) of completion and for any contributions received by the United States under the Plan 6 Funding Agreement for the features constructed in that stage, and for the 500 cubic feet per second of incremental capacity in the Granite Reef Aqueduct and pumping plants (see Article 9.7) to determine the net amount of each function assigned to the Contractor (Operation 4, Exhibit "A"). The Contractor's repayment obligation shall be the summation of the net amount for each function.

(c) Once the Contractor's estimated or final repayment obligation has been determined by the Contracting Officer, the obligation shall be allocated to each construction stage based on the ratio obtained by dividing the allocable cost of each construction stage by the allocable cost of the project. Each construction stage will have a separate 50-year repayment period. The repayment obligation for each stage will be divided into interest-bearing and interest-free components. The interest-free component shall be the amount allocable to irrigation purposes for the stage. The interest-bearing component

will be the amount obtained by subtracting the irrigation allocation for the stage from the obligation for the stage. The principal payments for each stage shall be determined by applying the percentages in Subarticle 9.3(f) to the repayment obligation for each stage. The total payment for each stage for any year shall be equal to the principal payment plus interest at the rate of 3.342 percent per annum on the unpaid interest-bearing component of the repayment obligation for each stage. For the water supply system, the portion of each principal payment which it made by the Contractor from irrigation revenues received by the Contractor each year will be used by the United States to reduce the interest-free obligation. The remaining portion of the principal payments made by the Contractor each year for the water supply system will be used by the United States to reduce the interest-bearing obligation, and once the interest-bearing obligation has been retired, the entire principal payment made by the Contractor will be applied by the United States toward the interest-free obligation. For the other construction stages, the entire principal payment made by the Contractor each year for such stages will be applied by the United States to reduce the interest-bearing obligation first, and once such obligation has been retired, to reduce the interest-free obligation.

(d) At 7-year intervals following the determination of the Contractor's repayment obligation for the water supply system, or at more frequent intervals if it becomes apparent to the Contracting Officer that a significant change in water use has or will occur, until such time as the interest-bearing obligation for each construction stage has been repaid, the Contracting Officer will re-estimate the proportions of total water deliveries to

irrigation and M&I water use over the 50-year repayment period for each stage. At such intervals, the Contracting Officer will adjust the original interest-bearing and interest-free allocation for each stage based on the new estimates and recalculate all preceding interest payments. Differences between amounts owed and amounts paid by the Contractor shall be adjusted by the Contracting Officer, who shall apply a credit against the Contractor's next payment due or notify the Contractor of the additional amount due, as the case may be. All such adjustments shall include interest at the rate of 3.342 percent per annum (compounded annually). Any additional payments required from the Contractor shall be made within 12 months of the Contractor's receipt of a statement from the Contracting Officer therefor. The Contractor may use the repayment reserve fund under Subarticle 10.3(b) hereof for any payment to the United States required as a result of the above adjustment.

(e) The Contracting Officer will notify the Contractor of (i) its estimated repayment obligation when construction of the first construction stage is substantially complete and upon completion of each subsequent construction stage, and (ii) the actual repayment obligation when the final construction stage has been completed, as determined by the Contracting Officer. In the event that the project ultimately consists only of the water supply system, New Waddell Dam, and Modified Roosevelt Dam, the Contractor's actual repayment obligation shall be limited to $2.0 billion. If prior to completion of construction of such features the Contracting Officer determines that the Contractor's repayment obligation for such features will exceed $2.0 billion, the Contracting Officer shall consult with the Contractor and continuation of

construction will be contingent upon the execution of an amendatory contract to cover the increased repayment obligation. If construction of any other construction stage will result in an increase in the Contractor's repayment obligation by an amount equal to or less than the respective amount identified in Exhibit "B," which is attached hereto and made part of this contract, the Contractor's repayment ceiling may, after consultation with the Contractor, be increased by the Contracting Officer by an amount equal to or less than the respective amount identified in Exhibit "B" by written notice thereof from the Contracting Officer to the Contractor. If construction of such other construction stage will result in an increase in the Contractor's repayment obligation by an amount greater than the respective amount identified in Exhibit "B," the Contracting Officer shall consult with the Contractor and the Contractor and the Contracting Officer shall agree upon one of the following courses of action prior to initiation of construction of such construction stage: (1) that additional repayment ceiling be made available from other construction stages, in which event the Contractor's repayment ceiling will be increased to the agreed-to amount by written notice from the Contracting Officer to the Contractor; or (2) that this contract be renegotiated to increase the Contractor's repayment ceiling; *Provided*, That these courses of action shall also apply in the event that, prior to completion of construction of such stage, the Contracting Officer determines that the construction of such stage will result in an increase in the Contractor's repayment obligation by an amount greater than the respective amount identified in Exhibit "B."

(f) Annual percentages of the repayment obligation for each construction stage shall be those set

out in the following schedule or any revision thereof mutually agreed upon:

Repayment Year	Percent of Repayment Obligation (Annual)
1-7	1.0
8-14	1.3
15-21	1.6
22-28	2.0
29-35	2.6
36-42	2.7
43-49	2.7
50	2.7

(g) In the event that the Secretary contracts for delivery of non-project water under the provisions of Article 10.1, capital charges associated with such delivery shall be calculated, charged, and utilized in the same manner as capital charges deposited in the Development Fund pursuant to Article 8.18.

9.4 Payment of Contractor's Construction Cost Repayment.

(a) The Contractor shall make annual payments to the United States, to be credited to the Development Fund, which shall be sufficient, when combined with accruals from the other sources described in Section 403(f) of the Basin Project Act, the Hoover Power Plant Act of 1984, and other miscellaneous revenues, including but not limited to net wheeling charges, to effect repayment of the repayment obligation for each construction stage within a period of not more than 50 years beginning with the year following substantial completion of each construction stage. The Contractor's first payment shall be due on or before January 15 of the year following the year in which the Secretary announces the substantial

completion of each construction stage. Annual payments thereafter shall be due on or before January 15 of each following year.

(b) The Contractor agrees to make annual payments calculated by the Secretary as follows:

(i) Calculate the annual principal payments required by the schedule in Subarticle 9.3(f) or any revision thereof for each construction stage.

(ii) Add to (i) the annual interest, at 3.342 percent, on the unpaid balance of the interest-bearing allocation for each construction stage.

(iii) Determine the total amount of all interest and principal payments due for all construction stages.

(iv) Subtract therefrom the revenues estimated to be available from the Development Fund anticipating a zero balance at the end of each year in the Development Fund.

(v) Make adjustments for differences between estimated and actual revenues for the preceding year.

(c) On or before each December 15, beginning with December 15 of the year in which the Secretary notifies the Contractor of the substantial completion of the first construction stage, the Secretary will notify the Contractor of the amount of the annual payment due on the following January 15, which has been determined by the Secretary on the basis of the aforesaid calculation.

(d) The Contractor may make additional payments on the repayment obligation at any time subject to such terms and conditions as may be agreed upon by the Contractor and the Contracting Officer; *Provided, however*, That all interest due is paid at the same time, whereupon appropriate adjustments in the schedule of future payments will be made by the Secretary, who shall as promptly as possible give the Contractor written notice of the adjusted repayment schedule.

(e) It is understood and agreed that the Contractor shall be obligated for the payments set forth in Subarticle 9.4(a) hereof and that regardless of the delinquency or default in payment of any charges due to the Contractor from any subcontractor, or a diminution in the water supply available to the Contractor, or regardless of any other reason, the Contractor shall complete repayment of each construction stage within a 50-year period beginning in the year following the announcement by the Secretary of substantial completion of such construction stage.

9.5 Commercial Power Rates. The Secretary will, consistent with applicable law, periodically review and provide for appropriate adjustments in the rates established for the sales of power and energy, revenues from which contribute to the Development Fund.

9.6 Other Costs Borne by the Contractor.

(a) In addition to the payments provided for in Article 9.4 hereof, and subject to the provisions of Subarticle 9.6(d) hereof, during such periods as the United States operates and maintains completed construction stages, the Contractor shall make advance payments for

OM&R costs incurred by the United States. The United States will furnish the Contractor with an estimate in writing at least 6 months prior to substantial completion of construction of the water supply system, of the OM&R cost due from the Contractor to the end of the then current year, together with an estimate of such cost for the calendar year immediately following. Within a reasonable time of the receipt of said estimates, as determined by the Contracting Officer, the Contractor shall advance to the United States the payments for the estimated OM&R cost to the end of the then current year and without further notice or demand shall on December 15 of the then current year and on June 15 of the following year advance to the United States in equal semiannual installments the Contractor's share of the estimated cost, including supervision and administrative expense for the OM&R of the water supply system. Advance payments shall be made in subsequent years by the Contractor to the United States on the basis of estimates to be furnished by the United States on or before November 15 preceding said subsequent year and the advances of said payments shall be due and payable in equal semiannual payments on the following December 15 and June 15. Said OM&R costs are the total annual OM&R costs of completed construction stages which are allocated to the irrigation and M&I water supply functions less (i) the costs described in Subarticle 9.6(c) hereof, and (ii) an amount determined by multiplying the total of said annual costs by the ratio obtained by dividing the estimated amount of project water projected to be delivered in the subsequent year to entities other than the Contractor, the subcontractors, and those entities in New Mexico to which project water will be made available from Hooker Dam or suitable alternative, by the total

amount of project water estimated to be delivered for use in that year.

(b) Differences between actual OM&R costs and the estimated costs shall be determined by the Contracting Officer and shall be adjusted in next succeeding estimates; *Provided, however,* That if in the opinion of the Contracting Officer the amounts advanced by the Contractor for any year are likely to be insufficient to pay the above-mentioned OM&R costs during such year, additional and sufficient sums of money shall be paid forthwith by the Contractor to the United States upon notice thereof and demand therefor by the Contracting Officer; *Provided, further,* That the United States will give Contractor reasonable notice in advance of any such deficiency.

(c) The Contractor's obligation to pay said OM&R costs of completed construction stages will be reduced to the extent that project water is made available for use in New Mexico following completion of Hooker Dam or suitable alternative. Said reduction will be in the proportion which the quantity of project water projected to be delivered to water users in Arizona, in exchange for Gila River system waters delivered to water users in New Mexico from or by means of project works, bears to the total quantity of Colorado River water projected to be delivered to the project that year.

(d) In the event that responsibility for OM&R of project facilities is transferred to and assumed by the Contractor, the Contractor shall be relieved of the obligation to make OM&R payments associated with such facilities under Subarticle 9.6(a) of this contract. In that event, the United States shall pay or provide for payment

of OM&R costs associated with delivery of water to entities other than the Contractor and the subcontractors. Such costs shall be computed in accordance with Subarticle 9.6(a) of this contract. If the Contractor does not receive payment in advance for such costs, the Contractor shall have no obligation to deliver such water.

(e) During the Hoover Dam cost-repayment period, the Contractor shall pay to the United States the sum of $0.25 for each acre-foot of water pumped from Lake Havasu for miscellaneous and M&I water purposes as determined by the Contracting Officer. The quantity of water pumped for such purposes will be determined by the Contracting Officer at the end of each calendar year and the Contractor notified of the amount due by March 1 of each subsequent year. Payment shall be due on May 1 following notification. Said payment shall be credited to the Colorado River Dam Fund established by Section 2 of the Boulder Canyon Project Act.

9.7 Repayment of Costs of Excess Capacity in Granite Reef Aqueduct. The costs of providing any capacity in the Granite Reef Aqueduct and pumping plants in excess of 2,500 cubic feet per second shall be repaid by Contractor from funds available to Arizona pursuant to the provisions of Section 403(f) of the Basin Project Act, or by funds from sources other than the Development Fund.

9.8 Ad Valorem Taxes, Assessments, Tolls, and Other Charges. Within the legal limits available to it, the Contractor shall levy ad valorem taxes upon the taxable property within the service area of the Contractor at rates determined necessary by the Contractor to raise funds which, together with the revenues from the sale of water and such financial assistance from the Development Fund

as the Secretary determines is available therefor, are sufficient to meet the obligations of the Contractor to make in full all payments to the United States on or before the date such payments become due and to meet its other obligations under this contract.

9.9 Continuation of Payments After Project Payout. Following payment to the United States of the Contractor's final payment for the last construction stage, the Contractor shall continue to make annual payments to the United States to be credited to the Development Fund in amounts equal to the average annual principal payment for the project during the overall repayment period. In the event that no augmentation project, as contemplated in the Basin Project Act, has been authorized or is under active consideration by the Congress at the time project construction costs have been repaid in full, payments under this formula will be not required; *Provided, however,* That payments will commence after repayment of the project costs pursuant to the formula, or any adjustment thereof agreed to by the parties, at such time as an augmentation project is authorized by Congress and the costs thereof allocated to the Contractor are determined by the Secretary.

9.10 Defaults.

(a) The Contractor shall pay a penalty on payments, installments or charges which become delinquent, computed at the rate of 1 percent per month on the amount of such delinquent payments, installments, or charges from and after the date when the same become due until paid.

(b) No water shall be furnished to the Contractor during any period in which the Contractor may

be in arrears more than 12 months in the payments to the United States required by Article 9.4 hereof.

(c) All rights of action for breach of this contract are reserved to the United States as provided by Federal law.

10. GENERAL PROVISIONS

10.1 Other Contracts. The Secretary reserves the right to contract directly with other water using entities concerning water supply through project facilities. In the event this occurs, the provisions of Article 8.17 hereof shall be applicable.

10.2 Title to Project Works. Title to all water supply system works and all project facilities constructed pursuant to the Basin Project Act and this contract shall be and remain in the United States until otherwise provided by Congress.

10.3 Reserve Funds.

(a) (i) Commencing with notice of transfer of OM&R for the Granite Reef Aqueduct, including the Havasu Pumping Plant, the Contractor shall accumulate and maintain an emergency OM&R reserve fund, which the Contractor shall keep available to meet costs incurred during periods of interruption of water service.

(ii) The Contractor shall accumulate the reserve fund with annual deposits, including interest and dividends accruing to fund balances or holdings, of not less than $400,000 in any year in which the fund balance is less than $4,000,000. The fund shall be invested in a Federally insured interest- or dividend-bearing account, or

in securities guaranteed by the Federal Government; *Provided,* That money in the reserve fund shall be available within a reasonable time to meet expenses for such purposes as those identified in Subarticle 10.3(a)(iv) hereof. Such annual deposits and the accumulation of Interest and dividends to the reserve fund shall continue until $4,000,000 is accumulated. Interest and dividends accruing to fund balances shall be added to the fund in any year when the fund balance is greater than $4,000,000; *Provided,* That in no event shall the fund be increased to an amount greater than the actual amount of fixed OM&R costs for the preceding year as mutually determined by the Contractor and the Contracting Officer. Any balance in the fund in excess of the amount of fixed OM&R costs for the previous year shall be considered to be the general funds of the Contractor and available for use as such.

(iii) Upon mutual agreement between the Contractor and the Contracting Officer, the amount to be accumulated and maintained in the reserve fund provided for in this Subarticle may be adjusted in consideration of the risk and uncertainty stemming from the size and complexity of the project, the size of the annual OM&R budget, additions to, deletions from, or changes in project works, or OM&R costs not contemplated when this contract was executed.

(iv) The Contractor may make expenditures from such reserve fund only for meeting unforeseen and extraordinary operation and maintenance costs, unusual or extraordinary repair or replacement costs, and betterment costs (in situations where recurrence of severe operation and maintenance problems can be avoided or eliminated). Proposed expenditures from the fund shall be

submitted to the Contracting Officer in writing for review and written approval prior to disbursement.

(v) During any period in which any of the project works are operated and maintained by the United States, the reserve fund shall be available for like use by the United States.

(vi) On or before February 1 of each year, the Contractor shall provide to the Contracting Officer an annual statement indicating the principal and accumulated interest in the emergency OM&R reserve fund as of December 31 of the preceding year.

(b) (i) No later than 1 year following the Contractor's last construction advance under the Plan 6 Funding Agreement, the Contractor shall accumulate and maintain a repayment reserve fund to help assure payments to the United States under this contract.

(ii) The Contractor shall accumulate such reserve fund with annual deposits, including interest and dividends accruing to fund balances or holdings, of not less than $4,000,000 in any year in which the fund balance is less than $40,000,000. The fund shall be invested in a Federally insured interest- or dividend-bearing account, or in securities guaranteed by the Federal Government; *Provided,* That money in the reserve fund shall be available within a reasonable time to meet expenses for the purpose for which it was established. Such annual deposits and the accumulation of interest to the reserve fund shall continue until $40,000,000 is accumulated. Any balance in the fund in excess of $40,000,000 shall be considered to be the general funds of the Contractor and available for use as such.

(iii) Upon mutual agreement between the Contractor and the Contracting Officer, the amount to be accumulated and maintained in the reserve fund provided for in this Subarticle may be adjusted.

(iv) Proposed expenditures from the fund shall be submitted to the Contracting Officer in writing for review and written approval prior to disbursement.

(v) On or before February 1 of each year, the Contractor shall provide to the Contracting Officer an annual statement of the principal and accumulated interest in the repayment reserve fund as of December 31 of the preceding year.

10.4 Recreational Use of Water Facilities.

(a) The enhancement of recreational opportunities in connection with the project works authorized pursuant to Title III of the Basin Project Act shall be in accordance with the provisions of the federal Water Project Recreation Act, 79 Stat. 213, dated July 9, 1965, except as provided in Subarticle 10.4(b) hereof.

(b) Recreational development at Orme Dam and Reservoir shall be governed by the provisions of Section 302(d) of the Basin Project Act.

10.5 Confirmation of Contract.

(a) The Contractor, after the execution of this contract, shall promptly seek to secure a decree of a court of competent jurisdiction of the State of Arizona confirming the execution of this contract. The Contractor shall furnish the United States a certified copy of the final decree, the validation proceedings, and all pertinent

supporting records of the court approving and confirming this contract, and decreeing and adjudging it to be lawful, valid, and binding on the Contractor. This contract shall not be binding on the United States or the Contractor until such final decree has been entered.

(b) This contract shall be indivisible for purposes of validation and shall not be binding on the United States or the Contractor unless validated pursuant to the provisions of Subarticle 10.5(a) hereof in each and all of its terms and conditions.

10.6 Rules, Regulations, and Determinations.

(a) The parties agree that the delivery of water or the use of Federal facilities pursuant to this contract is subject to Reclamation Law, as amended and supplemented, and the rules and regulations promulgated by the Secretary of the Interior under Reclamation Law.

(b) The Contracting Officer, after an opportunity has been offered to the Contractor for consultation, shall have the right to make rules, regulations, and determinations consistent with the provisions of this contract, the laws of the United States and the State of Arizona, including, without limitation, rules, regulations, and determinations relative to maximizing project benefits from pumping from Lake Havasu, the rate and schedule of pumping therefrom and the rate and schedule of pumping at the Granite Reef pumping plants, to add to or modify said rules, regulations, and determinations as may be deemed proper and necessary to carry out this contract, and to supply necessary details of its administration which are not covered by express provisions of this contract. The Contractor and each subcontractor shall observe such

rules, regulations, and determinations and each subcontract shall so provide.

(c) Where the terms of this contract provide for action to be based upon the opinion or determination of either party to this contract, whether or not stated to be conclusive, said terms shall not be construed as permitting such action to be predicated upon arbitrary, capricious, or unreasonable opinions or determinations. In the event that the Contractor questions any factual determination made by the Contracting Officer, the findings as to the facts shall be made by the Secretary only after consultation with the Contractor and shall be conclusive upon the parties.

10.7 Books, Records, and Reports. The Contractor shall establish and maintain accounts and other books and records pertaining to administration of the terms and conditions of this contract, including: the Contractor's financial transactions, water supply data, project operation, maintenance and replacement logs, project land and right-of-way use agreements, and other matters specifically relating to this contract that the Contracting Officer may require. Reports thereon shall be furnished to the Contracting Officer in such form and on such date or dates as the Contracting Officer may require. Subject to applicable Federal laws and regulations, each party to this contract shall have the right during office hours to examine and make copies of the other party's books and records relating to matters covered by this contract.

10.8 Notices. Any notice, demand, or request authorized or required by this contract shall be deemed to have been given, on behalf of the Contractor, when mailed, postage prepaid, or delivered to the Regional Director,

Lower Colorado Region, Bureau of Reclamation, P.O. Box 61470, Boulder City, Nevada 89006, and on behalf of the United States, when mailed, postage prepaid, or delivered to the General Manager of the Contractor, 23636 North 7th Street, Phoenix, Arizona 85024. The designation of the addressee or the address may be changed by notice given in the same manner as provided in this article for other notices.

10.9 Contingent on Appropriation or Allotment of Funds. The expenditure or advance of any money or the performance of any obligation by the United States under this contract shall be contingent upon appropriation or allotment of funds. Absence of appropriation or allotment of funds shall not relieve the Contractor from any obligations under this contract. No liability shall accrue to the United States in case funds are not appropriated or allotted.

10.10 Changes in Contractor's Organization. While this contract is in effect, no change shall be made in the Contractor's organization, by exclusion of lands, by dissolution, consolidation, merger or otherwise, except upon the Contracting Officer's written consent; *Provided, however,* That approval is hereby given to the inclusion of other counties as part of Contractor's service area, except, however, that the United States shall not be required, under this contract, to construct project facilities to serve lands within said additional counties.

10.11 Assignment Limited-Successors and Assigns Obligated. The provisions of this contract shall apply to and bind the successors and assigns of the parties hereto, but no assignment or transfer of this contract or any part

or interest therein shall be valid until approved in writing by the Contracting Officer.

10.12 Judicial Remedies Not Foreclosed. Nothing herein shall be construed (a) as depriving either party from pursuing and prosecuting any remedy in any appropriate court of the United States or the State of Arizona which would otherwise be available to such parties even though provisions herein may declare that determinations or decisions of the Secretary or other persons are conclusive or (b) as depriving either party of any defense thereto which would otherwise be available.

10.13 Equal Opportunity. During the performance of this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this Equal Opportunity clause.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will

receive consideration for employment without regard to race, color, religion, sex, or national origin.

(c) The Contractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Contracting Officer, advising the labor union or workers' representative of the Contractor's commitments under this Equal Opportunity clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(e) The Contractor shall furnish all information and reports required by said amended Executive Order and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by the Contracting Officer and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's noncompliance with the Equal Opportunity clause of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended, in whole or in part, and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in said amended Executive Order, and such other sanctions may be imposed and remedies invoked as provided in said amended Executive

Order, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(g) The Contractor will include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of said amended Executive Order, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the Contracting Officer may direct as a means of enforcing such provisions, including sanctions for noncompliance; *Provided, however,* That in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Contracting Officer, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

10.14 Compliance With Civil Rights Laws and Regulations.

(a) The Contractor shall comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), Section 504 of the Rehabilitation Act of 1975 (Public Law 93-112, as amended), the Age Discrimination Act of 1975 (42 U.S.C. 6101, *et seq.*) and any other applicable civil rights laws, as well as with their respective implementing regulations and guidelines imposed by the U.S. Department of the Interior and/or Bureau of Reclamation.

(b) These statutes require that no person in the United States shall, on the grounds of race, color, national origin, handicap, or age, be excluded from participation in, be denied the benefits of, or be otherwise

subjected to discrimination under any program or activity receiving financial assistance from the Bureau of Reclamation. By executing this contract, the Contractor agrees to immediately take any measures necessary to implement this obligation, including permitting officials of the United States to inspect premises, programs, and documents.

(c) The Contractor makes this agreement in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property discounts or other Federal financial assistance extended after the date hereof to the Contractor by the Bureau of Reclamation, including installment payments after such date on account of arrangements for Federal financial assistance which were approved before such date. The Contractor recognizes and agrees that such Federal assistance will be extended in reliance on the representations and agreements made in this article, and that the United States reserves the right to seek judicial enforcement thereof.

10.15 Officials Not to Benefit. No Member of or Delegate to Congress, Resident Commissioner or official of the Contractor shall benefit from this contract other than as a water user or landowner in the same manner as other water users or landowners.

11. STATUS OF DECEMBER 15, 1972 CONTRACT

Upon judicial confirmation of this contract, the December 15, 1972 contract entitled "Contract Between the United States and the Central Arizona Water Conservation District For Delivery of Water and Repayment of Costs of the Central Arizona Project" (Contract No. 14-06-W-245), shall be superseded and replaced by this contract.

IN WITNESS WHEREOF, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA

By /s/ [Illegible]
Assistant Secretary – Water and
Science Department of the Interior

CENTRAL ARIZONA
CONSERVATION DISTRICT

ATTEST:

/s/ Marilyn H. Ronstadt
Secretary

By /s/ Rod J. McMullen
President

Subcontract No. 4-07-30-W0045

CAWCD Revised 11/83

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

SUBCONTRACT AMONG THE UNITED STATES, THE CENTRAL ARIZONA WATER CONSERVATION DISTRICT, AND THE Central Arizona Irrigation and Drainage District
PROVIDING FOR WATER SERVICE

CENTRAL ARIZONA PROJECT

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Subcontract No. 4-07-30-W0045

CAWCD Revised 11-83

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

SUBCONTRACT AMONG THE UNITED STATES
THE CENTRAL ARIZONA WATER
CONSERVATION DISTRICT, AND THE
Central Arizona Irrigation and Drainage District
PROVIDING FOR WATER SERVICE
CENTRAL ARIZONA PROJECT

1. PREAMBLE:

THIS SUBCONTRACT, made this 21st day of November, 1983, in pursuance generally of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, including but not limited to the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057), as amended, the Reclamation Project Act of August 4, 1939 (53 Stat. 1187), as amended, the Reclamation Reform Act of October 12, 1982 (96 Stat. 1263), and particularly the Colorado River Basin Project Act of September 30, 1968 (82 Stat. 885), as amended, all collectively hereinafter referred to as the "Federal Reclamation Laws," among the UNITED STATES OF AMERICA, hereinafter referred to as the "United States" acting through the Secretary of the Interior, the CENTRAL ARIZONA WATER

CONSERVATION DISTRICT, hereinafter referred to as the "Contractor," a water conservation district organized under the laws of Arizona, with its principal place of business in Phoenix, Arizona, and the Central Arizona Irrigation and Drainage District, hereinafter referred to as the "Subcontractor," with its principal place of business in Eloy, Arizona;

WITNESSETH, THAT:

2. EXPLANATORY RECITALS:

WHEREAS, the Colorado River Basin Project Act provides, among other things, that for the purposes of furnishing irrigation and municipal and industrial water supplies to water deficient areas of Arizona and western New Mexico through direct diversion or exchange of water, control of floods, conservation and development of fish and wildlife resources, enhancement of recreation opportunities, and for other purposes, the Secretary of the Interior shall construct, operate, and maintain the Central Arizona Project; and

WHEREAS, pursuant to the provisions of Arizona Revised Statutes § 45-2601 et seq., the Contractor has been organized with the power to enter into a contract or contracts with the Secretary of the Interior to accomplish the purposes of Arizona Revised Statutes, § 45-2601 et seq.: and

WHEREAS, pursuant to Section 304(b)(1) of the Colorado River Basin Project Act, the Secretary of the Interior has determined that it is necessary to effect repayment of the cost of constructing the Central Arizona Project pursuant to a master contract and that the United

States, together with the Contractor, shall be a party to contracts that are in conformity with and subsidiary to the master contract; and

WHEREAS, the United States and the Contractor entered into Contract No. 14-06-W-245 dated December 15, 1972, hereinafter referred to as the "Repayment Contract," a copy of which is attached hereto as Exhibit "A" and by this reference made a part hereof, whereby the Contractor agrees to repay to the United States the reimbursable costs of the Central Arizona Project allocated to the Contractor; and

WHEREAS, the subcontractor is in need of a water supply and desires to subcontract with the United States and the Contractor for water service from water supplies available under the Central Arizona Project; and

WHEREAS, upon completion of the Central Arizona Project, water shall be available for delivery to the Subcontactor;

NOW THEREFORE, in consideration of the mutual and dependent covenants herein contained, it is agreed as follows:

3. DEFINITIONS:

Definitions included in the Repayment Contract are applicable to this subcontract; *Provided, however*, That the terms "Agricultural water" or "Irrigation water" shall mean water used for the purposes defined in the Repayment Contract on tracts of land operated in units of more than 5 acres. The first letters of terms so defined are capitalized herein. As heretofore indicated, a copy of the Repayment Contract is attached as Exhibit "A."

4. DELIVERY OF WATER:

4.1 Obligations of the United States. Subject to the terms, conditions, and provisions set forth herein and in the Repayment Contract, during such periods as it operates and maintains the Project Works, the United States shall deliver Project Water for Agricultural use by the Subcontractor. The United States shall use all reasonable diligence to make available to the Subcontractor the quantity of Project Water specified in the schedule submitted by the Subcontractor in accordance with Article 4.4. After transfer of OM&R to the Operating Agency, the United States shall make deliveries of Project Water to the Operating Agency which shall make subsequent delivery to the Subcontractor as provided herein.

4.2 Term of Subcontract. This subcontract shall become effective upon its confirmation as provided for in Article 6.12 and shall remain in effect for a period of 50 years beginning with the January 1 of the Year following that in which the Secretary issues the Notice of Completion of the Water Supply System; *Provided*, That this subcontract may be renewed upon written request by the Subcontractor upon terms and conditions of renewal to be agreed upon not later than 1 year prior to the expiration of this subcontract; *And Provided further*, That such terms and conditions shall be consistent with Article 9.9 of the Repayment Contract.

4.3 Conditions Relating to Delivery and Use. Delivery and use of water under this subcontract is conditioned on the following, and the Subcontractor hereby agrees that:

(a) All uses of Project Water and Return Flow shall be consistent with Arizona water law unless such law

is inconsistent with the Congressional directives applicable to the Central Arizona Project.

(b) The system or systems through which water for Agricultural, M&I and Miscellaneous (including ground-water recharge) purposes is conveyed after delivery to the Subcontactor shall consist of pipelines, canals, distribution systems, or other conduits provided and maintained with linings adequate in the Contracting Officer's judgment to prevent excessive conveyance losses.

(c) The Subcontractor shall not pump, or within its legal authority, permit others to pump ground water from within the exterior boundaries of the Subcontractor's service area, which has been delineated on a map filed with the Contractor and approved by the Contractor and the Contracting Officer, for use outside of said service area unless such pumping is permitted under Title 45, Chapter 2, Arizona Revised Statutes, as it may be amended from time to time, and the Contracting Officer, the Contractor, and the Subcontractor shall agree, or shall have previously agreed, that a surplus of ground water exists and drainage is or was required; *Provided, however*, That such pumping may be approved by the Contracting Officer and the Contractor, and approval shall not be unreasonably withheld, if such pumping is in accord with the Basin Project Act and upon submittal by the Subcontractor of a written certification from the Arizona Department of Water Resources or its successor agency that the pumping and transportation of ground water is in accord with Title 45, Chapter 2, Arizona Revised Statutes, as it may be amended from time to time.

(d) The Subcontractor shall not sell or otherwise dispose of or permit the sale or other disposition of my

Project Water for use outside of Maricopa, Pinal and Pima Counties; *Provided*, *however*, That this does not prohibit exchanges of Project Water covered by separate agreements.

(e)(i) Project Water scheduled for delivery in any Year under this subcontract may be used by the Subcontractor or resold or exchanged by the Subcontractor pursuant to appropriate agreements approved by the Contracting Officer and the Contractor. If said water is resold or exchanged by the Subcontractor for an amount in excess of that which the Subcontractor is obligated to pay under this Subcontract, the excess amount shall be paid forthwith by the Subcontractor to the Contractor for application against the Contractor's Repayment Obligation to the United States; *Provided*, *however*, That the Subcontractor shall be entitled to recover actual costs of transportation, treatment, and distribution, including but not limited to capital costs and OM&R costs.

(ii) Project Water scheduled for delivery in any year under this subcontract that cannot be used, resold, or exchanged by the Subcontractor may be made available by the Contracting Officer and Contractor to other users. If such Project Water is sold to or exchanged with other users, the Subcontractor shall be relieved of its payments hereunder only to the extent of the amount paid to the Contractor by such other users, but not to exceed the amount the Subcontractor is obligated to pay under this subcontract for said water.

(iii) In the event the Subcontractor or the Contracting Officer and the Contractor are unable to sell any portion of the Subcontractor's Project Water scheduled for delivery and not required by the Subcontractor, the

Subcontractor shall be relieved of the pumping energy portion of the OM&R charges associated with the undelivered water as determined by the Contractor.

(f) Unless and until otherwise provided by Congress, Project Water shall not be made available directly or indirectly for the irrigation of lands in the Subcontractor's service area which the Secretary determines were not irrigated during the period September 30, 1958, to September 30, 1968, except where otherwise determined by the Secretary for efficiency of the Subcontractor's operation.

(g) Agricultural Water shall be made available only for the irrigation of eligible lands. "Eligible lands" shall mean those lands which were irrigated during the period of September 30, 1958, to September 30, 1968, and meet all other Federal requirements and which may legally be irrigated pursuant to Title 45, Chapter 2, Arizona Revised Statutes, as it may be amended from time to time. Said eligible lands are shown on the map which is attached hereto as Exhibit "B" and by this reference made a part hereof.

(h) Agricultural Water shall not be made available to the Subcontractor until there are in effect measures which are adequate in the judgment of the Contracting Officer and the Contractor to control expansion of irrigation from aquifers affected by irrigation in the Subcontractor's service area and to reduce pumping of ground water in the Subcontractor's service area by the amount of Project Agricultural Water received.

(i) Subject to the prior approval of the Contracting Officer and the Contractor, which approval shall not be unreasonably withheld, Agricultural Water made available

hereunder for eligible lands may be converted to M&I purposes if and to the extent that such water is no longer required by the Subcontractor for irrigation purposes and shall be converted in all cases where eligible lands receiving Project Agricultural Water have been converted to M&I use; *Provided*, That the water converted from irrigation to M&I purposes as a result of the conversion of eligible lands to M&I uses shall be used only for M&I purposes within the service area of the entity responsible for serving the converted lands. Such conversion of water use for eligible lands shall be at the rate of 1 acre-foot per acre minus the average annual surface water supply for said acre which was available for use during the 1958-1976 period as determined by the Contracting Officer. Conversion of water from agricultural to M&I purposes shall take effect only upon execution or amendment of an appropriate subcontract among the United States, the Contractor, and the M&I user. All Project Water converted from agricultural to M&I use shall be delivered at the same water service charge per acre-foot as other M&I Water and with the same priority as other Project M&I Water; *Provided*, That the Contractor's charge to the Subcontractor for water service shall be adjusted to reflect the conversion to M&I uses.

4.4 Procedure for Ordering Water.

(a) At least 15 months prior to the date the Secretary expects to issue the Notice of Completion of the Water Supply System, or as soon thereafter as is practicable, the Contracting Officer shall announce by written notice to the Contractor the amount of Project Water available for delivery during the Year in which said Notice of Completion is issued (initial Year of water delivery) and

during the following Year. Within 30 days of receiving such notice, the Contractor shall issue a notice of availability of Project Water to the Subcontractor. The Subcontractor shall, within a reasonable period of time as determined by the Contractor, submit a written schedule to the Contractor and the Contracting Officer showing the quantity of water desired by the Subcontractor during each month of said initial Year and the following Year. The Contractor shall notify the Subcontractor by written notice of the Contractor's action on the requested schedule within 2 months of the date of receipt of such request.

(b) The amounts, times, and rates of delivery of Project Water to the Subcontractor during each Year subsequent to the Year following said initial Year of water delivery shall be in accordance with a water delivery schedule for that Year. Such schedule shall be determined in the following manner:

(i) On or before June 1 of each Year beginning with the Year following the initial Year of water delivery pursuant to this subcontract, the Contracting Officer shall announce the amount of Project Water available for delivery during the following Year in a written notice to the Contractor. In arriving at this determination, the Contracting Officer, subject to the provisions of the Repayment Contract, shall use his best efforts to maximize the availability and delivery of Arizona's full entitlement of Colorado River water over the term of this subcontract. Within 30 days of receiving said notice, the Contractor shall issue a notice of availability of Project Water to the Subcontractor.

(ii) On or before October 1 of each Year beginning with the Year following said initial Year of water

delivery, the Subcontractor shall submit in writing to the Contractor and the Contracting Officer a water delivery schedule indicating the amounts of Project Water desired by the Subcontractor during each month of the following Year along with preliminary estimate of Project Water desired for the succeeding 2 years.

(iii) Upon receipt of the schedule, the Contractor and the Contracting Officer shall review it and, after consultation with the Subcontractor, shall make only such modifications to the schedule as are necessary to ensure that the amounts, times, and rates of delivery to the Subcontractor are consistent with the delivery capability of the Project, considering, among other things, the availability of water and the delivery schedules of all subcontractors.

(iv) On or before November 15 of each Year beginning with the Year following said initial Year of water delivery, the Contractor shall determine and furnish to the Subcontractor and the Contracting Officer the water delivery schedule for the following Year which shall show the amount of water to be delivered to the Subcontractor during each month of that Year, contingent upon the Subcontractor remaining eligible to receive water under all terms contained herein.

(c) The monthly water delivery schedules may be amended upon the Subcontractor's written request to the Contractor. Proposed amendments shall be submitted by the Subcontractor to the Contractor no later than 15 days before the desired change is to become effective, and shall be subject to review and modification in like manner as the schedule. The Contractor shall notify the Subcontractor and the Contracting Officer of its action on the

Subcontractor's requested schedule modification within 10 days of the Contractor's receipt of such request.

(d) The Contractor and the Subcontractor shall hold the United States, its officers, agents, and employees, harmless on account of damage or claim of damage of any nature whatsoever arising out of or connected with the actions of the Contractor regarding water delivery schedules furnished to the Subcontractor.

(e) In no event shall the Contracting Officer or the Contractor be required to deliver to the Subcontractor from the Water Supply System in any one month a total amount of Project Water greater than 11 percent of the Subcontractor's annual entitlement for that Year; *Provided, however*, That the Contracting Officer may deliver a greater percentage in any month if such increased delivery is compatible with the overall delivery of Project Water to other subcontractors as determined by the Contracting Officer and the Contractor and if the Subcontractor agrees to accept such increased deliveries.

4.5 Points of Delivery – Measurement and Responsibility for Distribution of Water.

(a) The water to be furnished to the Subcontractor pursuant to this subcontract shall be delivered at turnouts to be constructed by the United States at such point(s) on the Water Supply System as may be agreed upon in writing by the Contracting Officer and the Contractor, after consultation with the Subcontractor.

(b) Unless the United States and the Subcontractor agree by contract to the contrary, the Subcontractor shall construct and install, at its sole cost and expense,

connection facilities required to take and convey the water from the turnouts to the Subcontractor's service area. The Subcontractor shall furnish, for approval of the Contracting Officer, drawings showing the construction to be performed by the Subcontractor within the Water Supply System right-of-way 6 months before starting said construction. The facilities may be installed, operated, and maintained on the Water Supply System right-of-way subject to such reasonable restrictions and regulations as to type, location, method of installation, operation and maintenance as may be prescribed by the Contracting Officer.

(c) All water delivered from the Water Supply System shall be measured with equipment furnished and installed by the United States and operated and maintained by the United States or the Operating Agency. Upon the request of the Subcontractor or the Contractor, the accuracy of such measurements shall be investigated by the Contracting Officer or the Operating Agency, Contractor, and Subcontractor, and any errors which may be mutually determined to have occurred therein shall be adjusted; *Provided*, That in the event the parties cannot agree on the required adjustment, the Contracting Officer's determination shall be conclusive.

(d) Neither the United States, the Contractor, nor the Operating Agency shall be responsible for the control, carriage, handling, use, disposal, or distribution of Project Water beyond the delivery point(s) agreed to pursuant to Subarticle 4.5 (a). The Subcontractor shall hold the United States, the Contractor, and the Operating Agency harmless on account of damage or claim of damage of any nature whatsoever for which there is legal responsibility, including property damage, personal injury or death

arising out of or connected with the Subcontractor's control, carriage, handling, use, disposal, or distribution of such water beyond said delivery point(s).

4.6 Temporary Reductions. In addition to the right of the United States under Subarticle 8.3(a)(iv) of the Repayment Contract temporarily to discontinue or reduce the amount of water to be delivered, the United States or the Operating Agency may, after consultation with the Contractor, temporarily discontinue or reduce the quantity of water to be furnished to the Subcontractor as herein provided for the purposes of investigation, inspection, maintenance, repair, or replacement of any of the Project facilities or any part thereof necessary for the furnishing of water to the Subcontractor, but so far as feasible the United States or the Operating Agency shall coordinate any such discontinuance or reduction with the Subcontractor and shall give the Subcontractor due notice in advance of such temporary discontinuance or reduction, except in case of emergency, in which case no notice need be given. Neither the United States, its officers, agents, and employees, nor the Operating Agency, its officers, agents, and employees, shall be liable for damages when, for any reason whatsoever, any such temporary discontinuance or reduction in delivery of water occurs. If any such discontinuance or temporary reduction results in deliveries to the Subcontractor of less water than what has been paid for in advance, the Subcontractor shall be entitled to be reimbursed for the appropriate proportion of such advance payments prior to the date of the Subcontractor's next payment of water service charges or the Subcontractor may be given credit toward the next payment of water charges if the Subcontractor should so desire.

4.7 Priority in Case of Shortage. Subject to the provisions of Section 304(e) of the Basin Project Act, any Project Water furnished for non-Indians through Project facilities shall, in the event of shortage thereof, as determined by the Contracting Officer after consultation with the Contractor, be reduced pro rata until exhausted, first for Miscellaneous Water uses and next for Agricultural Water uses before water furnished for non-Indian M&I use is reduced. Thereafter, water for M&I uses shall be reduced pro rata among all non-Indian M&I users. All Project Water converted from agricultural to M&I use shall be delivered with the same priority as other Project M&I Water. Pursuant to the authority vested in the Secretary by the Reclamation Act of 1902 (32 Stat. 388), as amended and supplemented, the Basin Project Act, the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Part 1505), and the Implementing Procedures of the U. S. Department of the Interior (516 DM 5.4), the relative priorities between Indian and non-Indian uses will be determined by the Secretary consistent with the allocations published in the *Federal Register* on March 24, 1983.

4.8 Secretarial Control of Return Flow.

(a) The Secretary reserves the right to capture all Return Flow flowing from the exterior boundaries of the Contractor's Service Area as a source of supply and for distribution to and use of the Central Arizona Project to the fullest extent practicable. The Secretary also reserves the right to capture for Project use Return Flow which originates or results from water contracted for from the Central Arizona Project within the boundaries of the Contractor's Service Area if, in his judgment, such Return

Flow is not being put to a beneficial use. The Subcontractor may recapture and reuse or sell its Return Flow; *Provided, however,* That such Return Flow may not be sold for use outside Maricopa, Pinal and Pima Counties. The Subcontractor shall, at least 60 days in advance of any proposed sale of such water, furnish the following information in writing to the Contracting Officer and the Contractor:

(i) The name and address of the prospective buyer.

(ii) The location and proposed use of the Return Flow.

(iii) The price to be charged for the Return Flow.

(b) The price charged for the Return Flow may cover the cost incurred by the Subcontractor for Project Water plus the cost required to make the Return Flow usable. If the price received for the Return Flow is greater than the costs incurred by the Subcontractor, as described above, the excess amount shall be forthwith returned by the Subcontractor to the Contractor for application against the Contractor's Repayment Obligation to the United States. Costs required to make Return Flow usable shall include but not be limited to capital costs and OM&R costs including transportation, treatment and distribution, and the portion thereof which may be retained by the Subcontractor shall be subject to the advance approval of the Contractor and the Contracting Officer.

(c) Any Return Flow captured by the United States and determined by the Contracting Officer and the Contractor to be suitable and available for use by the Subcontractor may be delivered by the United States or

Operating Agency to the Subcontractor as a part of water supply for which the Subcontractor subcontracts hereunder and such water shall be accounted and paid for pursuant to the provisions hereof.

(d) All capture, recapture, use, reuse and sale of Return Flow under this article shall be in accord with Arizona water law.

4.9 Water Acquired by Subcontractor Other Than From the United States.

(a) The provisions of Subarticles 6.4(a) and (b) of this subcontract shall not be applicable to or affect non-Project Water or water rights now owned or hereafter acquired by the Subcontractor from sources other than from the United States unless such non-Project Water is transported through distribution facilities of the Subcontractor constructed or financed by the United States. If Project and non-Project Waters are commingled, Subarticles 6.4(a) and (b) of this subcontract shall apply as follows:

(i) If Project and non-Project Waters are transported through non-Federally financed distribution facilities, only Project Water is subject to Subarticles 6.4(a) and (b) of this subcontract.

(ii) If Project and non-Project Waters are transported through Federally financed distribution facilities, both Project and non-Project Waters are subject to Subarticles 6.5(a) and (b) of this subcontract.

(b) With respect to the distribution facilities or portions thereof in which commingling occurs as provided in subarticle (a)(i) hereof, the Subcontractor:

(i) Shall install and be responsible for the OM&R of separate outlets from the distribution facilities for nonexcess and excess lands. At the request of the Contracting Officer, the Subcontractor shall be responsible for the installation and OM&R of water measuring equipment at delivery points to excess lands and, further, shall be responsible for the installation and OM&R of similar equipment for measuring the water available to the Subcontractor other than from the Central Arizona Project, and the Contracting Officer may check and inspect said equipment at any time; and

(ii) Agrees that the quantity of Project Water furnished to it shall be delivered only to eligible lands through the aforesaid outlets. The Subcontractor shall be deemed to be in breach of this Article and Subarticles 6.4(a) and (b) of this subcontract if at any time there is furnished to any excess lands not covered by recordable contracts and served by the distribution facilities, or portions thereof in which commingling occurs, a quantity of water which is greater than that which the Subcontractor has introduced into said system from the supply available other than pursuant to this subcontract.

(c) Should breach of this Article and Subarticles 6.4(a) and (b) be determined by the Contracting Officer, there shall be no further delivery of Project Water to the Subcontractor until the Subcontractor is in compliance with such provisions as determined by the Contracting Officer. In the event that delivery of Project Water is denied to the Subcontractor due to non-compliance the provisions of Subarticle 4.3 (e) shall apply.

4.10 Water and Air Pollution Control. The Subcontractor, in carrying out this subcontract, shall comply with

all applicable water and air pollution laws and regulations of the United States and the State of Arizona and shall obtain all required permits or licenses from the appropriate Federal, State, or local authorities.

4.11 Quality of Water. The operation and maintenance of Project facilities shall be performed in such manner as is practicable to maintain the quality of water made available through such facilities at the highest level reasonably attainable as determined by the Contracting Officer. Neither the United States, the Contractor, nor the Operating Agency warrants the quality of water and is under no obligation to construct or furnish water treatment facilities to maintain or better the quality of water. The Subcontractor waives its right to make a claim against the United States, the Operating Agency, the Contractor or another Subcontractor because of changes in water quality caused by the comingling of Project water with other water.

4.12 Exchange Water.

(a) Where the Contracting Officer determines the Subcontractor is physically able to receive Colorado River mainstream water in exchange for or in replacement of existing supplies of water from surface sources other than the Colorado River, the Contracting Officer may require that the Subcontractor accept said mainstream water in exchange for or in replacement of said existing supplies pursuant to the provisions of Section 304(d) of the Basin Project Act: *Provided, however,* That a subcontractor on the Project aqueduct shall not be required to enter into exchanges in which existing supplies of water from surface

sources are diverted for use by other Subcontractors downstream on the Project aqueduct.

(b) If, in the event of shortages, the Subcontractor has yielded water from other surface water sources in exchange for Colorado River mainstream water supplied by the Contractor or the Operating Agency, the Subcontractor shall have first priority against other users supplied with Project Water that have not yielded water from other surface water sources but only in quantities adequate to replace the water so yielded.

4.13 Entitlement to Project Agricultural Water.

(a) Commencing with the Year in which the Secretary issues the Notice of Completion of the Water Supply System and for each Year thereafter until the term of this subcontract expires, the Subcontractor's entitlement to Agricultural Water each Year shall be equal to *18.01* percent of the total supply of Agricultural Water available for delivery from the Project in the same Year; minus the amount of Project Agricultural Water that would have been delivered to eligible lands in the Subcontractor's service area that have been converted to M&I use or have otherwise been removed from irrigation as determined by the Contracting Officer and calculated on the basis of a uniform delivery amount per acre to all eligible lands in the Subcontractor's service area at the time of execution of this subcontract; plus *18.01* percent of the sum of deductions made in all subcontractors' entitlements to reflect removal of eligible lands from agricultural use; *Provided, however,* That after consultation with the Subcontractor, the Contracting Officer may, from time to time, adjust said percent of the sum of deductions as he

determines necessary to more accurately reflect the Subcontractor's equitable share of such water.

(b) After consultation with the Arizona Department of Water Resources, the Secretary shall reallocate for non-Indian agricultural use all entitlements to Agricultural Water that were not contracted for by the entities to which such entitlements were first made available. In the event the Secretary allocates an additional Agricultural Water entitlement to the Subcontractor, the Subcontractor's entitlement specified in Subarticle 4.13(a) shall be adjusted by written notice from the Contracting Officer to the Subcontractor and the Contractor.

4.14 Delivery of Project Water Prior to Completion of Project Works. Prior to the date of issuance of the Notice of Completion of the Water Supply System by the Secretary, water may be made available for delivery by the Secretary on a "when available" basis at a water rate and other terms to be determined by the Secretary after consultation with the Contractor.

5. PAYMENTS:

5.1 Water Service Charges for Payment of Operation, Maintenance, and Replacement Costs. Subject to the provisions of Article 5.4 hereof, the Subcontractor shall pay in advance for Project OM&R costs estimated to be incurred by the United States or the Operating Agency. At least 15 months prior to first delivery of Project Water, or as soon thereafter as is practicable, the Contractor shall furnish the Subcontractor with an estimate of the Subcontractor's share of OM&R costs to the end of the initial Year of water delivery and an estimate of such costs for the following Year. Within a reasonable time of the receipt of

said estimates, as determined by the Contractor, but prior to the delivery of water, the Subcontractor shall advance to the Contractor its share of such estimated costs to the end of the initial month of water delivery and without further notice or demand shall on or before the first day of each succeeding month of the initial Year of water delivery and the following Year advance to the Contractor in equal monthly installments the Subcontractor's share of such estimated costs. Advances of monthly payments for each subsequent Year shall be made by the Subcontractor to the Contractor on the basis of annual estimates to be furnished by the Contractor on or before June 1 preceding each said subsequent Year and the advances of payments for said estimated costs shall be due and payable in equal monthly payments on or before the first day of each month of the subsequent Year. Differences between actual OM&R costs and estimated OM&R costs shall be determined by the Contractor and shall be adjusted in the next succeeding annual estimates; *Provided, however,* That if in the opinion of the Contractor the amount of any annual OM&R estimate is likely to be insufficient to cover the above-mentioned costs during such period, the Contractor may increase the annual estimate of the Subcontractor's OM&R costs by written notice thereof to the Subcontractor, and the Subcontractor shall forthwith increase its remaining monthly payments in such Year to the Contractor by the amount necessary to cover the insufficiency. All estimates of OM&R costs shall be accompanied by data and computations relied on by the Contractor in determining the amounts of the estimated OM&R costs and shall be subject to joint review by the Subcontractor and the Contractor.

5.2 Agricultural Water Service Charges.

(a) Subject to the provisions of Article 5.4 hereof and in addition to the OM&R payments required in Article 5.1 hereof, the Subcontractor shall, in advance of the delivery of Project Agricultural Water by the United States for the Operating Agency, make payments to the Contractor in equal semiannual installments of an Agricultural Water service capital charge of *$2.00* for each acre-foot of Agricultural Water scheduled for delivery to the Subcontractor pursuant to the provisions of Articles 4.4 and 4.13 hereof. The Agricultural Water service capital charge payment for the quantity of water available for the Subcontractor for the balance of the initial Year of water delivery shall be advanced to the Contractor prior to commencement of delivery of water. Thereafter, for each subsequent Year, payments by the Subcontractor shall be made in equal semiannual installments on or before the December 1 preceding said subsequent Year and the June 1 of said subsequent Year as may be specified by the Contractor in written notices to the Subcontractor.

(b) The Agricultural Water service capital charge may be adjusted periodically to reflect changes in repayment ability as determined by the Contracting Officer after consultation with the Contractor and Subcontractor. Any changes in the capital charge shall be announced by the Contractor on or before June 1 of the Year preceding the Year in which payable.

(c) On or before the first anniversary of execution of this subcontract and on or before each succeeding anniversary, until Notice of Completion of the Water Supply System is issued, the Subcontractor shall pay, in addition to all other payments required herein, an agricultural subcontract charge which shall be equal to the amount

obtained by multiplying the percentage in Subarticle 4.13(a) by $500,000. Prior to the date of issuance of the Notice of Completion of the, Water Supply System, the subcontract charge shall be paid each Year by the Subcontractor to the United States. The Contracting Officer shall advise the Contractor of the amounts and dates of the Subcontractor's payments.

(d) Funds advanced to the United States by the Subcontractor pursuant to Subarticle 5.2(c) as a subcontracting charge shall be credited by the Contractor against the Subcontractor's initial capital charges for water deliveries under this subcontract. Credit provided to the Subcontractor shall include interest from the date Subcontractor's funds are transferred to the United States through the effective date of credit for payment of capital costs as recorded in the Contractor's records. Interest credited to the Subcontractor shall be at an annual rate of 1 (one) percent less than the weighted rate received by the Contractor on all investments during the period for which the Subcontractor's payments earn an interest credit.

(e) The obligation of the Subcontractor to pay Agricultural Water service capital charges and corresponding OM&R charges to the Contractor as provided in Articles 5.1 and 5.2 hereof is a general obligation of the Subcontractor notwithstanding the manner in which the obligation may be distributed among the Subcontractor's water users and notwithstanding the default of individual water users in their obligations to the Subcontractor.

(f) Payment of the agricultural subcontract charge and all Agricultural Water service capital and corresponding OM&R charges becoming due hereunder prior to or on

the dates stipulated in Articles 5.1 and 5.2 is a condition precedent to delivery of Agricultural Water under this subcontract.

(g) The Subcontractor shall not furnish Agricultural Water made available pursuant to this subcontract to parties which are in arrears in the payment of charges as levied or established by the Contractor.

(h) If deliveries of Project Agricultural Water to the Subcontractor are less than that which has been paid for in advance, the Subcontractor shall be entitled to be reimbursed by the Contractor for the appropriate portion of such advance payments prior to the date of the Subcontractor's next payment of water service charges.

5.3 Loss of Entitlement. The Subcontractor shall have no right to delivery of water from Project facilities during any period in which the Subcontractor may be in arrears in the payment of any charges due the Contractor. The Contractor may sell to another entity any water determined to be available under the Subcontractor's entitlement for which payment is in arrears; *Provided, however,* That the Subcontractor may regain the right to use any unsold portion of the water determined to be available under the original entitlement upon payment of all delinquent charges plus any difference between the subcontractual obligation and the price received in the sale of the water by the Contractor and payment of charges for the current period.

5.4 Refusal to Accept Delivery. In the event the Subcontractor fails or refuses in any Year to accept delivery of the quantity of water available for delivery to and required to be accepted by it pursuant to this subcontract, or in the event the Subcontractor in any Year fails to

submit a schedule for delivery as provided in Article 4.4 hereof, said failure or refusal shall not relieve the Subcontractor of its obligation to make the payments required in this subcontract. The Subcontractor agrees to make payment for available water which is refused in the same manner as if said water were scheduled for delivery to and accepted by it in accordance with this subcontract except as provided in Subarticle 4.3(e) and Article 5.3; *Provided, however,* That if the Subcontractor shall require Distribution Works constructed pursuant to Section 309(b) of the Basin Project Act, as amended, to transport water from the Central Arizona Project aqueduct to the point of treatment or use, then the Subcontractor shall not be required to pay capital or OM&R charges until January 1, 1990, or until such time as the Subcontractor begins taking Project Water through the Distribution Works contructed pursuant to a repayment contract under the aforementioned Act, whichever comes first.

5.5 Charge for Late Payments. The Subcontractor shall pay a late payment charge on installments or charges which are received after the due date. The late payment charge percentage rate calculated by the Department of the Treasury and published quarterly in the *Federal Register* shall be used; *Provided,* That the late payment charge percentage rate shall not be less than 0.5 percent per month. The late payment charge percentage rate applied on an overdue payment shall remain in effect until payment is received. The late payment rate for a 30-day period shall be determined on the day immediately following the due date and shall be applied to the overdue payment for any portion of the 30-day period of delinquency. In the case of partial late payments, the amount

received shall first be applied to the late charge on the overdue payment and then to the overdue payment.

6. GENERAL PROVISIONS:

6.1 Repayment Contract Controlling. Pursuant to the Repayment Contract, the United States has agreed to construct and, in the absence of an approved Operating Agency, to operate and maintain the works of the Central Arizona Project and to deliver Project Water to the various subcontractors within the Project Service Area; and the Contractor has obligated itself for the payment of various costs, expenses, and other amounts allocated to Contractor pursuant to Article 9 of the Repayment Contract. The Subcontractor expressly approves and agrees to all the terms presently set out in the Repayment Contract including Subarticle 8.8(b)(viii) thereof, or as such terms may be hereafter amended, and agrees to be bound by the actions to be taken and the determinations to be made under that Repayment Contract, except as otherwise provided herein.

6.2 Notices. Any notice, demand or request authorized or required by this subcontract shall be deemed to have been given when mailed, postage prepaid, or delivered to the Regional Director, Lower Colorado Region, Bureau of Reclamation, P. O. Box 427, Boulder City, Nevada 89005, on behalf of the Contractor or Subcontractor; to the Central Arizona Water Conservation District, Suite 706, 111 West Monroe, Phoenix, Arizona 85003, on behalf of the United States or Subcontractor; and to the Central Arizona Irrigation and Drainage District, P. O. Box 605, Eloy, Arizona 85321 on behalf of the United States or Contractor. The designation of the addressee or

the address may be changed by notice given in the same manner as provided in this Article for other notices.

6.3 Water Conservation Program.

(a) While the contents and standards of a given water conservation program are primarily matters of State and local determination, there is a strong Federal interest in developing an effective water conservation program because of this subcontract. The Subcontractor shall develop and implement an effective water conservation program for all uses of water which is provided from or conveyed through Federally constructed or Federally financed facilities. That water conservation program shall contain definite goals, appropriate water conservation measures, and time schedules for meeting the water conservation objectives.

(b) A water conservation program, acceptable to the Contractor and the Contracting Officer, shall be in existence prior to one or all of the following: (1) service of Federally store/conveyed water; (2) transfer of operation and maintenance of the Project facilities to the Contractor or Operating Agency; or (3) transfer of the Project to an operation and maintenance status. The distribution and use of Federally stored/conveyed water and/or the operation of Project facilities transferred to the Contractor shall be consistent with the adopted water conservation program. Following execution of this subcontract, and at subsequent 5-year intervals, the Subcontractor shall resubmit the water conservation plan to the Contractor and the Contracting Officer for review and approval. After review of the results of the previous 5 years and after consultation with the Contractor, the Subcontractor and

the Arizona Department of Water Resources or its successor, the Contracting Officer may require modifications in the water conservation program to better achieve program goals.

6.4 Rules, Regulations, and Determinations.

(a) The parties agree that the delivery of irrigation water or use of Federal facilities pursuant to this subcontract is subject to Reclamation law, as amended and supplemented, including but not limited to the Reclamation Reform Act of 1982 (Public Law 97-293).

(b) The Subcontractor and the Contractor further agree to abide by final rules and regulations promulgated by the Secretary of the Interior covering the enforcement and administration of said limitations and provisions of Reclamation law as amended and supplemented by the Reclamation Reform Act of 1982, including the payment of full costs as provided therein.

(c) The Contracting Officer shall have the right to make, after an opportunity has been offered to the Contractor and Subcontractor for consultation, rules and regulations consistent with the provisions of this subcontract, the laws of the United States and the State of Arizona, to add to or to modify them as may be deemed proper and necessary to carry out this subcontract, and to supply necessary details of its administration which are not covered by express provisions of this subcontract. The Contractor and Subcontractor shall observe such rules and regulations.

(d) Where the terms of this subcontract provide for action to be based upon the opinion or determination of

any party to this subcontract, whether or not stated to be conclusive, said terms shall not be construed as permitting such action to be predicated upon arbitrary, capricious, or unreasonabe opinions or determinations. In the event that the Contractor or Subcontractor questions any factual determination made by the Contracting Officer, the findings as to the facts shall be made by the Secretary only after consultation with the Contractor or Subcontractor and shall be conclusive upon the parties.

6.5 Officials Not to Benefit.

(a) No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this subcontract or to any benefit that may arise here-from. This restriction shall not be construed to extend to this subcontract if made with a corporation or company for its general benefit.

(b) No official of the Subcontractor shall receive any benefit that may arise by reason of this subcontract other than as a water user within the Project and in the same manner as other water users within the Project.

6.6 Assignment Limited – Successors and Assigns Obligated.

The provisions of this subcontract shall apply to and bind the successors and assigns of the parties hereto, but no assignment or transfer of this subcontract or any part or interest therein shall be valid until approved by the Contracting Officer.

6.7 Judicial Remedies Not Foreclosed. Nothing herein shall be construed (a) as depriving any party from pursuing

and prosecuting any remedy in any appropriate court of the United States or the State of Arizona which would otherwise be available to such parties even though provisions herein may declare that determinations or decisions of the Secretary or other persons are conclusive or (b) as depriving any party of any defense thereto which would otherwise be available.

6.8 Books, Records, and Reports. The Subcontractor shall establish and maintain accounts and other books and records pertaining to its financial transactions, land use and crop census, water supply, water use, changes of Project works, and to other matters as the Contracting Officer may require. Reports thereon shall be furnished to the Contracting Officer in such form and on such date or dates as he may require. Subject to applicable Federal laws and regulations, each party shall have the right during office hours to examine and make copies of each other's books and records relating to matters covered by this subcontract.

6.9 Changes in Subcontractor's Geographical Jurisdiction. While this subcontract is in effect, no changes shall be made in the Subcontractor's geographical jurisdiction, by inclusion or exclusion of lands, by dissolution, consolidation, merger or otherwise, except upon the Contracting Officer's written consent.

6.10 Equal Opportunity.

During the performance of this subcontract, the Subcontractor agrees as follows:

(a) The Subcontractor shall not discriminate against any employee or applicant for employment because of race,

color, religion, sex, or national origin. The Subcontractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Subcontractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(b) The Subcontractor shall, in all solicitations or advertisements for employees placed by or on behalf of the Subcontractor, state that all qualified applicants shall receive consideration for employment without discrimination because of race, color, religion, sex, or national origin.

(c) The Subcontractor shall send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Contracting Officer, advising said labor union or workers' representative of the Subcontractor's commitments under Section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Subcontractor shall comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(e) The Subcontractor shall furnish all information and reports required by said amended Executive Order and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and shall permit access to its books, records, and accounts by the Contracting Officer and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Subcontractor's noncompliance with the nondiscrimination clauses of this subcontract or with any of the rules, regulations, or orders, this subcontract may be canceled, terminated, or suspended, in whole or in part, and the Subcontractor may be declared ineligible for further Government contracts in accordance with procedures authorized in said amended Executive Order and such other sanctions may be imposed and remedies invoked as provided in said amended Executive Order, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(g) The Subcontractor shall include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by the rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of said amended Executive Order, so that such provisions shall be binding upon each subcontractor or vendor. The Subcontractor shall take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* That in the event a Subcontractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the Subcontractor may request the United

States to enter into such litigation to protect the interest of the United States.

6.11 Title VI, Civil Rights Act of 1964

The Subcontractor agrees that it shall comply with Title VI of the Civil Rights Act of July 2, 1964 (78 Stat. 241), and all requirements imposed by or pursuant to the Department of the Interior Regulation (43 CFR 17) issued pursuant to that title, to the end that, in accordance with Title VI of that Act and the Regulation, no person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Subcontractor receives financial assistance from the United States and hereby gives assurance that it shall immediately take any measures to effectuate this agreement.

(b) If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the Subcontractor by the United States, this assurance obligates the Subcontractor, or in the case of any transfer of such property, any transferee for the period during which the real property or structure is used for a purpose involving the provision of similar services or benefits. If any personal property is so provided, this assurance obligates the Subcontractor for the period during which it retains ownership or possession of the property. In all other cases, this assurance obligates the Subcontractor for the period during which the Federal financial assistance is extended to it by the United States.

(c) This assurance is given in consideration of and for the purpose of obtaining any and all Federal grants,

loans, contracts, property, discounts, or other Federal financial assistance extended after the date hereof to the Subcontractor by the United States, including installment payments after such date on account of arrangements for Federal financial assistance which were approved before such date. The Subcontractor recognizes and agrees that such Federal financial assistance shall be extended in reliance on the representations and agreements made in this assurance, and that the United States shall reserve the right to seek judicial enforcement of this assurance. This assurance is binding on the Subcontractor, its successors, transferees, and assignees.

6.12 Confirmation of Subcontract. The obligation of the United States pursuant to this subcontract shall be contingent upon its authorization or ratification by the qualified electors of the Subcontractor at an election held for that purpose. The Subcontractor shall furnish the Contracting Officer and the Contractor with a copy of the results of such election. The Subcontractor, after authorization or ratification by election and upon the execution of this subcontract, shall promptly seek a final decree of the proper court of the State of Arizona approving and confirming the subcontract and decreeing and adjudging it to be lawful, valid, and binding on the Subcontractor. The Subcontractor shall furnish to the United States a certified copy of such decree and of all pertinent supporting records. This subcontract shall not be binding on the United States, the Contractor, or the Subcontractor until such final decree has been entered.

6.13 Contingent on Appropriation or Allotment of Funds. The expenditure or advance of any money or the performance of any work by the United States hereunder

which may require appropriation of money by the Congress or the allotment of funds shall be contingent upon such appropriation or allotment being made. The failure of the Congress to appropriate funds or the absence of any allotment of funds shall not relieve the Subcontractor from any obligation under this subcontract. No liability shall accrue to the United States in case such funds are not appropriated or allotted.

IN WITNESS WHEREOF, the parties have executed this subcontract No. 4-07-30-W0045 the day and year first above-written.

Legal Review and Approval

THE UNITED STATES OF AMERICA

By: /s/ [Illegible]
Field Solicitor,
Phoenix, Arizona

By: /s/ [Illegible]
Regional Director
Lower Colorado Region
Bureau of Reclamation

CENTRAL ARIZONA WATER CONSERVATION DISTRICT

Attest: /s/ Lynn H. Sharp
Secretary

By: /s/ Dale R. Shumway
Title: president

Central Arizona Irrigation and Drainage District

Attest: [Illegible]
Secretary

By: /s/ Norman Pritzer
Title: President

Richard N. Morrison, #005269
M. Byron Lewis, #002047
Mark A. McGinnis, #013958
SALMON, LEWIS & WELDON, P.L.C.
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(602) 801-9060

Attorneys for Defendants Central Arizona Irrigation and Drainage District

[RELEVANT EXCERPTS]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PINAL

JOHN E. SMITH and MARY LOU SMITH, husband and wife; JOHN E. SMITH, as Trustee of the SMITH FAMILY TRUST; and PRETZER LAND AND CATTLE COMPANY, an Arizona corporation, et al.,

Plaintiffs,

vs.

MARICOPA-STANFIELD IRRIGATION & DRAINAGE DISTRICT, an Arizona municipal corporation, and CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICT, an Arizona municipal corporation, political subdivisions of the State of Arizona, et al.,

Defendants.

No. CV 2001-00924

CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICTS STATEMENT OF FACTS

(Assigned to the Hon. Kelly M. Robertson)

Pursuant to Rule 56(c) of the Arizona Rules of Civil Procedure, Defendant Central Arizona Irrigation and Drainage District ("CAIDD") responds to Plaintiffs' Supplemental Statement of Facts filed on December 11, 2003. CAIDD also submits its own Separate Statement of Facts, which in addition to the parties' January 2, 2002 Joint Statement of Facts ("JSOF") and CAIDD's response to Plaintiffs' Supplemental Statement of Facts, supports the denial of Plaintiffs' motion for partial summary judgment and the grant of judgment in favor of CAIDD as a matter of law.

* * *

CAIDD'S SEPARATE STATEMENT OF FACTS

In addition to its response to Plaintiffs' Supplemental Statement of Facts, CAIDD also submits its own Separate Statement of Facts in support of the denial of Plaintiffs' partial summary judgment motion and the grant of CAIDD's cross-motion.

* * *

Financial Difficulties for CAP Agricultural Water Users in the Early 1990s

16. Not long after commencement of CAP water delivery in CAIDD and surrounding agricultural areas in 1990, it became clear that the use and payment for CAP water by various individuals and entities presented substantial difficulties not previously fully understood. The cost of CAP Subcontract water to farmers, in Pinal County and elsewhere, was going to be substantially higher than the cost of other water supplies (e.g., groundwater from pumps) and also substantially higher than most farmers and irrigation districts could afford.

See Ward Affidavit, *supra*, ¶ 13; *see also generally* P. Wilson, "An Economic Assessment of Central Arizona Project Agriculture: A Report Submitted to the Office of the Governor and the Arizona Department of Water Resources" (November 1992) [excerpts attached as Exhibit 6 to Motion to Dismiss].

17. In addition to the high costs of water, CAIDD also faced substantial debt service on the private bond debt and on the loans made by the Federal Government to construct the water distribution facilities necessary to bring CAP water from the main CAP aqueduct and to deliver groundwater to the individual farms. *See* Contract Between the United States and the Central Arizona Irrigation and Drainage District Providing for Construction of a Water Distribution System (November 21, 1983) [JSOF Exhibit 5]; *see also* Ward Affidavit, *supra*, ¶ 14. Because the loans to the Federal Government are authorized by Section 9(d) of the Federal Reclamation Act, that portion of the debt is commonly referred to as "9(d) debt."

18. As a result of these problems, CAIDD and New Magma Irrigation and Drainage District, as well as numerous individual farmers, filed for bankruptcy protection. In addition, the Governor established two different study groups to search for solutions to two interrelated problems facing the state: (1) the inability of districts and farmers to pay for CAP water under the existing subcontracts; and (2) the State's inability to utilize a substantial portion of the Colorado River water that had been allocated for the CAP. *See* Ward Affidavit, *supra*, ¶ 15; *see also generally* Report of Governor's Task Force on Central Arizona Project Issues (August 27, 1992) [copy attached as Exhibit 8 to Motion to Dismiss]; Governor's Central Arizona Project Advisory Committee, Final Report and Recommendations

(October 1993) [copy attached as Exhibit 9 to Motion to Dismiss].

19. Part of the outgrowth of the Governor's Task Force and Advisory Committee was a temporary restructuring of the contractual arrangements for the delivery of CAP water to agricultural users. The goal was to reduce the price of CAP water to districts and, consequently, to farmers in order to provide incentive to increase their use of CAP water. CAIDD entered into a letter agreement with CAWCD in late 1993 to accomplish these purposes. *See* Letter Agreement between CAWCD and CAIDD (November 8, 1993) ("Letter Agreement") [copy attached as Exhibit 10 to Motion to Dismiss]; *see also* Ward Affidavit, *supra*, ¶ 16.

20. In the Letter Agreement, CAIDD agreed, for the term of the Letter Agreement, to waive its right to receive CAP water delivery under the Subcontract. *See* Letter Agreement, *supra*, ¶ 1, at 1. CAIDD further agreed, for the term of the Letter Agreement, to waive any contractual right it had to convert its CAP water use from agricultural to municipal and industrial ("M&I") purposes. *See id.* ¶ 2, at 2. In exchange, CAWCD agreed to allow CAIDD the opportunity to purchase CAP water for agricultural purposes pursuant to a separate contract between CAIDD and CAWCD. *Id.* at 3.

* * *

22. As anticipated by the Letter Agreement, CAIDD soon thereafter entered into a separate interim contract with CAWCD for delivery of CAP water for agricultural purposes. *See* Agreement Between the Central Arizona Water Conservation District and Central Arizona Irrigation and Drainage District Providing for the Delivery of

Excess Central Arizona Project Water (January 1, 1994) ("1994 Excess Water Contract") [copy attached as Exhibit 11 to Motion to Dismiss]. This contract provided for the delivery of irrigation water at a total cost that was substantially less than that which CAIDD would have paid under the Subcontract. This agreement terminated on December 31, 2003. *See id.; see also* Ward Affidavit, *supra,* ¶ 19.

23. CAIDD executed the 1994 Excess Water Contract at essentially the same time the Secretary declared CAP construction to be substantially complete. Prior to the notice of substantial completion, CAIDD had received CAP water for a few years under a series of low-cost interim contracts. Neither CAIDD nor any of the Plaintiffs has ever received, delivered, or used any water under the actual Subcontract. *See* Exhibit A, ¶ 9.

Water Settlement Negotiations

24. In part because the 1994 Excess Water Contract expired on its own terms at the end of 2003, CAIDD has been in contact with representatives of CAWCD and the United States in recent years to discuss possible future options. The United States and CAWCD have an ongoing dispute regarding the overall repayment of the cost of building the CAP, which resulted in the filing of a lawsuit in the United States District Court for the District of Arizona. *See Central Arizona Water Conservation Dist. v. United States,* D. Ariz., Nos. CIV 95-65-TUC-EHC and CIV 95-1725-PHX-EHC (consolidated) ("*CAWCD v. U.S.*"). CAIDD intervened as a party in that lawsuit. The dispute between the United States and CAWCD is subject to a

conditional settlement between the two entities. *See* Exhibit A, ¶ 10.

25. The *CAWCD v. U.S.* settlement is conditioned in part upon the settlement of water right claims by and on behalf of the Gila River Indian Community ("GRIC"). As a result, the United States, CAWCD, and various other non-Indian entities began investigating various options whereby CAIDD and others would exchange their existing CAP subcontracts for an agreement by CAWCD to continue to make CAP water available to those entities for agricultural purposes under terms similar to those stated in the 1994 Excess Water Contract. Those negotiations involved numerous parties and lasted several years. *See* Exhibit A, ¶ 11.

26. On December 5, 2002, CAWCD, the State of Arizona acting through the Arizona Department of Water Resources, and the United States of America reached agreement on the terms of the Arizona Water Settlement Agreement for the purposes of, among others, effectuating the *CAWCD v. U.S.* settlement and making certain quantities of CAP water available to the United States for allocation to various Arizona Indian communities. CAIDD is not a party to the Arizona Water Settlement Agreement. That agreement, however, is the basis for a comprehensive series of agreements involving many entities, including CAIDD. Full implementation of the Arizona Water Settlement Agreement is conditioned upon a number of future events, including passage of federal authorizing legislation. *See* Exhibit A, ¶ 12.

27. The Arizona Water Settlement Agreement, if and when fully implemented, would resolve disputes over CAIDD's CAP water contracts and provide for a new CAP

excess water contract with favorable pricing commitments through 2030, in exchange for the relinquishment of CAP-eligible acres' rights under CAIDD's Subcontract. *See* Exhibit A, ¶ 13.

28. The current estimated price of water that would be delivered under the Subcontract in 2004 is $76.00 per acre-foot, and the price of water under the excess water contract would be approximately $28.00 per acre-foot in 2004. *See* Exhibit A, ¶ 14.

* * *

CAIDD's Decision to Participate in the Settlement

31. The CAIDD Board of Directors took significant steps to review the benefits to CAIDD from participating in the comprehensive settlement and to obtain input from landowners on the relevant issues prior to executing the new contracts. *Id.* ¶ 17.

32. On April 17, 2003, CAIDD held a special election to obtain the landowners' views on whether CAIDD should relinquish some or all of its Subcontract entitlement. The results of that election were that landowners holding 29,380.29 acres in CAIDD voted in favor of amending the Subcontract to effectuate relinquishment under the settlement, and landowners owning 3,476 acres were opposed. *Id.* ¶ 18.

* * *

37. Neither CAIDD nor any of the Plaintiffs has attempted to comply with the Arizona prior appropriation statutes to obtain an appropriative right to receive Colorado River water though the CAP. *Id.* ¶ 28.

DATED this 31st day of December, 2003.

SALMON, LEWIS & WELDON, P.L.C.

By /s/ Mark A. McGinnis
Richard N. Morrison
M. Byron Lewis
Mark A. McGinnis
2850 E. Camelback Road,
Suite 200
Phoenix, AZ 85016
Attorneys for CAIDD

ORIGINAL of the foregoing with attachment, mailed for filing this 31st day of December, 2003 to:

Clerk of the Court
Pinal County Superior Court
P.O. Box 2730
Florence, AZ 85232-2730

AFFIDAVIT OF PAUL R. ORME

STATE OF ARIZONA)
) ss
County of Maricopa)

[RELEVANT EXCERPTS]

PAUL R. ORME, being first duly sworn upon his oath deposes and says:

1. He is an attorney licensed to practice law in Arizona, with his primary office in Mayer, Arizona. He is General Counsel for the Central Arizona Irrigation and Drainage District ("CAIDD") and the Maricopa-Stanfield Irrigation & Drainage District ("MSIDD") in Pinal County, Arizona. He has been an attorney for CAIDD and MSIDD since 1980 and has been General Counsel for both districts since May 1995.

2. In his role as an attorney for CAIDD and MSIDD, he was personally involved in negotiating, drafting, and implementing various contracts and agreements relating to the receipt of Central Arizona Project ("CAP") water by the districts in the 1980s, as well as certain contracts and agreements relating to the districts' delivery of irrigation water to their respective landowners during that same period.

3. As General Counsel for both districts since 1995, he has been personally involved in discussions regarding the Arizona Water Settlement Agreement and a complex series of agreements involving the districts' exchange of their existing CAP Subcontracts for a long-term excess CAP water contract and certain other benefits.

4. This affidavit is submitted in support of the districts' responses to Plaintiffs' Motion for Partial Summary Judgment filed on December 11, 2003 in *Smith, et al.*

v. Maricopa-Stanfield Irrigation & Drainage District, et al. (Pinal County Superior Court No. Cv2001-00924) ("Plaintiffs' Motion") and in support of the districts' cross-motions for summary judgment in that same cause. The statements in this affidavit are based upon Mr. Orme's personal knowledge and upon review of records maintained by CAIDD and MSIDD in the ordinary course of their business.

* * *

Use of CAP Subcontract Water

9. CAIDD and MSIDD executed 1994 Excess Water Contracts at essentially the same time as the Secretary of the Interior declared CAP construction to be substantially complete. *See* Agreements Between the Central Arizona Water Conservation District and Central Arizona Irrigation and Drainage District and Maricopa-Stanfield Irrigation and Drainage District Providing for Delivery of Excess Central Arizona Project Water (January 1, 1994) ("1994 Excess Water Contracts"). Prior to the notice of substantial completion, CAIDD and MSIDD had received CAP water for a few years under a series of low-cost interim contracts. Neither CAIDD nor MSIDD (or any of their landowners) ever received, delivered, or used any CAP water under the actual Subcontracts. *See* Subcontracts Among the United States, the Central Arizona Water Conservation District, the Central Arizona Irrigation and Drainage District and Maricopa-Stanfield Irrigation & Drainage District Providing for Water Service (November 21, 1983) ("Subcontracts").

Water Settlement Negotiations

10. In part because the 1994 Excess Water Contracts expired on their own terms at the end of 2003, CAIDD and MSIDD have been in contact with representatives of CAWCD and the United States in recent years to discuss possible future options. The United States and CAWCD have an ongoing dispute regarding the overall repayment of the cost of building the CAP, which resulted in the filing of a lawsuit in the United States District Court for the District of Arizona. *See Central Arizona Water Conservation Dist. v. United States*, D. Ariz., Nos. CIV 95-65-TUC-EHC and CIV 95-1725-PHX-EHC (consolidated) ("*CAWCD v. U.S.*"). CAIDD intervened as a party in that lawsuit. The dispute between the United States and CAWCD is subject to a conditional settlement between the two entities.

11. The *CAWCD v. U.S.* settlement is conditioned in part upon the settlement of water right claims by and on behalf of the Gila River Indian Community ("GRIC"). As a result, the United States, CAWCD, and various other non-Indian entities began investigating various options whereby CAIDD, MSIDD and others would exchange their existing CAP subcontracts for an agreement by CAWCD to continue to make CAP water available to those entities for agricultural purposes under terms similar to those stated in the 1994 Excess Water Contracts. Those negotiations involved numerous parties and lasted several years.

12. On December 5, 2002, CAWCD, the State of Arizona acting through the Arizona Department of Water Resources, and the United States of America reached agreement on the terms of the Arizona Water Settlement Agreement for the purposes of, among others, effectuating

the *CAWCD v. U.S.* settlement and making certain quantities of CAP water available to the United States for allocation to various Arizona Indian communities. CAIDD and MSIDD were not parties to the Arizona Water Settlement Agreement. That agreement, however, is the basis for a comprehensive series of agreements involving many entities, including CAIDD and MSIDD. Full implementation of the Arizona Water Settlement Agreement is conditioned upon a number of future events, including passage of federal authorizing legislation.

13. The Arizona Water Settlement Agreement, if and when fully implemented, would resolve disputes over CAIDD's and MSIDD's CAP water contracts and provide for new CAP excess water contracts with favorable pricing commitments through 2030, in exchange for the relinquishment of CAP-eligible acres' rights under the Subcontracts.

14. The current estimated price of water that would be delivered under the Subcontracts in 2004 is $76.00 per acre-foot, and the price of water under the excess water contracts would be approximately $28.00 per acre-foot in 2004.

* * *

CAIDD's Decision to Participate in the Settlement

17. The CAIDD Board of Directors took significant steps to review the benefits to CAIDD from participating in the comprehensive settlement and to obtain input from landowners on the relevant issues prior to executing the new contracts.

18. On April 17, 2003, CAIDD held a special election to obtain the landowners' views on whether CAIDD should

relinquish some or all of its Subcontract entitlement. The results of that election were that landowners holding 29,380.29 acres in CAIDD voted in favor of amending the Subcontract to effectuate relinquishment under the settlement, and landowners owning 3,476 acres were opposed.

* * *

MSIDD's Decision to Participate in the Settlement

23. The MSIDD Board of Directors took significant steps to review the benefits to MSIDD from participating in the comprehensive settlement and to obtain input from landowners on the relevant issues prior to executing the new contracts. The benefits of the GRIC settlement to CAIDD are substantially the same for MSIDD

24. On June 19, 2003, MSIDD held a special election to obtain the landowners' views on whether MSIDD should, pursuant to the Agreements, relinquish some or all of its water rights under preexisting contracts. The results of that election were that landowners holding 28,074 acres in MSIDD voted in favor of relinquishment, and landowners owning 20,295 acres were opposed.

* * *

Prior Appropriation

28. Due to the legal structure of the Law of the River generally and the CAP specifically, neither CAIDD nor MSIDD has attempted to comply with the Arizona prior appropriation statutes to obtain an appropriative right to receive and use Colorado River water through the CAP

and, to the best of Mr. Orme's knowledge and information, Plaintiffs also have made no such attempt.

/s/ Paul R. Orme
PAUL R. ORME

SUBSCRIBED AND SWORN TO before me this 30th day of December, 2003.

/s/ Joyce E. Mlejnek

My Commission Expires:

[LOGO] Notary Public State of Arizona
Maricopa County
Joyce E Mlejnek
Expires March 25, 2004